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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 3

ELLEN GOETT, AS ADMINISTRATRIX OF THE ESTATE OF MARVIN PAUL GOETT, DECEASED, PETITIONER,

vs.

UNION CARBIDE CORPORATION AND AMHERST BARGE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 25, 1958

CERTIORARI GRANTED MARCH 2, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

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[fol. 4] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA CHARLESTON DIVISION

Civil No. 1755

Plaintiff Demands a Jury Trial

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased, Plaintiff,

—against—

CARBIDE & CARBON CHEMICALS CORPORATION and UNION CARBIDE & CARBON CORPORATION, Defendants.

COMPLAINT—Filed February 7, 1956

Plaintiff, complaining of the defendants, by her attorneys, states and alleges upon information and belief, as follows:

FOR A FIRST CAUSE OF ACTION:

First: That prior to the commencement of this action Ellen Goett was duly appointed Administratrix of the Estate of Marvin Paul Goett, deceased.

Second: That at all the times hereinafter mentioned, the defendant Carbide & Carbon Chemicals Corporation was a foreign corporation, duly licensed to do business in the State of West Virginia and having its office and principal place of business in the City of Charleston, West Virginia.

Third: That at all the times hereinafter mentioned, the defendant Union Carbide & Carbon Corporation, was a foreign corporation, duly licensed to do business in the State of West Virginia and having its office and principal place of business in the City of Charleston, West Virginia.

Fourth: That at all the times hereinafter mentioned, the plaintiff was and still is a citizen and resident of the State of West Virginia, within the jurisdiction of this Honorable Court.

Fifth: That the jurisdiction of this case arises and is [fol. 5] conferred upon this Court by reason of diversity of citizenship and amount. That the amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

Sixth: That at all the times hereinafter mentioned, the defendant Carbide & Carbon Chemicals Corporation owned, operated, managed and controlled a certain barge or vessel known as "204".

Seventh: That at all the times hereinafter mentioned, the defendant Union Carbide & Carbon Corporation, owned, operated, managed and controlled a certain barge or vessel known as "204".

Eighth: That the defendant Carbide & Carbon Chemicals Corporation was under a duty to keep and maintain the aforesaid vessel and its appurtenances in a safe and seaworthy condition.

Ninth: That the defendant Union Carbide & Carbon Corporation was under a duty to keep and maintain the aforesaid vessel and its appurtenances in a safe and seaworthy condition.

Tenth: That at all the times hereinafter mentioned, the decedent Marvin Paul Goett was employed aboard the aforementioned vessel in the capacity of a harbor worker as a sand blaster and for the purposes of this action, a seaman.

Eleventh: That at all the times hereinafter mentioned, the decedent Marvin Paul Goett was employed aboard the aforementioned vessel in the capacity of a harbor worker as a sand blaster and for the purposes of this action, a seaman.

[fol. 6] Twelfth: That on or about the 5th day of October, 1955, the deceased was lawfully aboard the aforesaid vessel, being employed thereon as aforesaid, and while so lawfully aboard the said vessel, the deceased Marvin Paul Goett was caused to fall and sustain severe personal injuries, he suffered conscious pain, mental anguish, physical suffering and subsequent death.

Thirteenth: That the aforesaid accident and injuries sustained thereby were due to the carelessness, recklessness and negligence of the defendants and each of them, their agents, servants and employees; the fault, neglect and omission of the officers and seamen aboard the aforesaid vessel; the failure, neglect and omission of the defendants and each of them to keep and maintain the aforesaid vessel and its appurtenances in a seaworthy condition and reasonable state of repair, and the defendants' failure to take any means of precautions for the safety of the decedent, Marvin Paul Goett; in failing to provide the decedent with a reasonably safe place wherein to work, and in causing, allowing and permitting the vessel to be in an unseaworthy, unsafe and otherwise dangerous condition by failure to provide life preservers, live lines, safety nets and proper, adequate and sufficient safety men and other tools and equipment and other means of rescue to safeguard the health and well-being of the decedent, so that the decedent was caused to fall and suffer the injuries complained of and subsequent death, and the defendants and each of them were otherwise careless, reckless and negligent in the premises as aforesaid.

Fourteenth: That the aforesaid accident and the injuries sustained were due solely to the carelessness, recklessness and negligence of the defendants and each of them, their agents, servants and employees and without any contributory negligence on the part of the decedent.

[fol. 7] Fifteenth: That by reason of all of the foregoing, the said Marvin Paul Goett died on the 5th day of October, 1955.

Sixteenth: That the decedent died leaving him surviving heirs at law and next of kin who were dependent upon him for their support and maintenance and upon whose behalf this action is being brought.

Seventeenth: That by reason of the foregoing, the heirs at law and next of kin of the decedent Marvin Paul Goett have been damaged in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars.

FOR A SECOND CAUSE OF ACTION:

Eighteenth: Plaintiff repeats and realleges all of the allegations contained in paragraphs "First" to "Fourteenth" inclusive, with the same force and effect as if set forth herein at length, and in addition thereto alleges:

Nineteenth: That as a result of the foregoing, the said Marvin Paul Goett sustained severe injuries to his head, body and limbs, nerves and nervous system, and had been caused to suffer severe physical pain and mental anguish as a result thereof, all to his damage in the sum of Fifty Thousand ($50,000.00) Dollars.

Wherefore, plaintiff demands judgment against the defendants herein in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars on the first cause of action, and in the sum of Fifty Thousand ($50,000.00) Dollars on the second cause of action, together with the costs and disbursements of this action.

Pauley & Andrews, By E. Franklin Pauley, Attorneys for Plaintiff, Office and P. O. Address, Peoples Building, Charleston, West Virginia.

S. Eldridge Sampliner, Esq., Of Counsel.

[fol. 10] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

Civil Action No. 1755

ELLEN GOETT, as Administratrix of the Estate of
Marvin Paul Goett, deceased, Plaintiff,

—against—

UNION CARBIDE & CARBON CORPORATION,
a corporation, Defendant.

THIRD PARTY COMPLAINT—Filed April 2, 1956

1. Plaintiff, Ellen Goett, as Administratrix of the Estate of Marvin Paul Goett, deceased, has filed against defendant, Union Carbide & Carbon Corporation, a corporation, complaint a copy of which is hereto attached as Exhibit C.

2. Defendant avers and charges that it is entitled to recover from the third party defendant all or part of what plaintiff may recover from this defendant by reason of the fact that the barge known as CC-204 at the time of the accident complained of in Exhibit C was in the exclusive care, custody, possession and control of said Amherst Barge Company for purposes of repair and that the said decedent, Marvin Paul Goett, was an employee of said Amherst Barge Company working on said barge in said possession of said Amherst Barge Company under a contract for repair with this defendant.

Inasmuch as said barge CC-204 was in the exclusive possession, care, custody and control of said Amherst Barge Company at the time of said accident, the primary liability for any loss, damages or claims therefor would, as a matter of law, be imposed upon said third party defendant because in absence of express contract a vessel owner is entitled to indemnity for amount recovered by con-

tractor's employee, if negligence of contractor, having exclusive custody of vessel, is the sole, active or primary cause of accident in which contractor's employee is injured. [fol. 11] But in addition to said liability imposed as a matter of law defendant avers and charges that in its contract for repairs of said barge with said third party defendant appears the following clause:

> "INSURANCE: If this agreement provides for work to be performed by Seller (Amherst Barge Company) on property owned or controlled by Buyer (Union Carbide and Carbon Corporation), or on property of others named herein, Seller shall insure to each of its employees engaged upon the work the compensation provided for by, and shall strictly comply with, each and every statute applicable thereto with respect to Workmen's Compensation and/or Employers' Liabili y and shall procure and maintain, at the cost and expense of the Seller, until final acceptance of the work by the Buyer, Public Liability Insurance in a reputable and financially responsible insurance company, properly safeguarding the Seller against liability for injuries to persons, including injuries resulting in death, in amounts acceptable to the Buyer, and shall furnish to Buyer written certificates from insurance carriers or from appropriate Governmental authorities establishing that said insurance of employees and said Public Liability Insurance have been procured and are being properly maintained, and that the premiums therefor are paid, and specifying the names of the insurers and the respective policy numbers and expiration dates. All such insurance policies shall provide (unless by statute applicable thereto it is otherwise provided) that in the event of cancellation thereof, written notice of such cancellation shall be given to Buyer at least five (5) days prior to the effective date of such cancellation."

And defendant further charges and alleges that both as a matter of law and by said express contract the said third party defendant would be liable to it for all loss or damage which might have been incurred or occasioned

by its care, custody and repair while said barge was in its exclusive custody, care and control.

Wherefore, defendant, Union Carbide & Carbon Corporation, demands judgment against said third party defendant, Amherst Barge Company, a corporation, for all sums that may be adjudged against said defendant and in favor of the plaintiff, as well as its costs about its defense in this behalf expended.

Charles M. Love, Attorney for Defendant, Security Building, Charleston, West Virginia.

[fol. 12]

EXHIBIT "C"—COMPLAINT

Omitted. Printed side page 4 supra.

[fol. 16] — [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 1755

ELLEN GOETT, as Administratrix of the Estate of Marvin Paul Goett, deceased, Plaintiff,

v.

UNION CARBIDE & CARBON CORPORATION, a corporation, Defendant and Third-Party Plaintiff,

v.

AMHERST BARGE COMPANY, a corporation, Third-Party Defendant.

ANSWER OF AMHERST BARGE COMPANY TO THIRD-PARTY COMPLAINT FILED BY UNION CARBIDE & CARBON CORPORATION AGAINST AMHERST BARGE COMPANY, A CORPORATION—Filed April 20, 1956

1. This third-party defendant admits the allegations contained in Paragraph 1 of the third-party complaint.

2. This third-party defendant admits the following allegations contained in Paragraph 2 of the third-party complaint:

A. That said barge was owned by Union Carbide & Carbon Corporation and pursuant to a contract between said Union Carbide and the third-party de- [fol. 17] fendant, the latter was doing certain work on the barge at the time of Goett's death and said decedent was an employee of this third-party defendant and working on said barge at the time of his death.

B. That while so employed Goett came to his death from drowning in the Kanawha River.

3. This third-party defendant denies all other allegations in said Paragraph 2 of said complaint, including the allegation that the third-party defendant had exclusive control of said barge at the time of Goett's death.

4. This third-party defendant avers that it complied with the provisions of the laws of the United States popularly known as the Longshoremen's and Harbor Workers' Compensation Act (U. S. Code, Title 33, Sections 901-950), and subscribed to the compensation provided for therein; and that the dependents of the said Marvin Paul Goett are entitled to the compensation benefits described in said Act and so provided for by this third-party defendant.

5. This third-party defendant denies that it was in any manner negligent and avers that if the decedent died as the result of negligence, that such negligence resulted from the acts of said decedent or of the third-party plaintiff or of both.

6. This third-party defendant denies any duty or obligation to indemnify Union Carbide & Carbon Corporation against said accident or against any claims, suits, costs, judgments or other losses arising therefrom.

Wherefore, this third-party defendant denies all liability and responsibility for said accident; alleges that it was [fol. 18] free of all negligence; avers that it is completely

protected by subscribing to the aforesaid compensation act; and asks to be dismissed.

Jackson, Kelly, Holt & O'Farrell, W. T. O'Farrell, Attorneys for Amherst Barge Company, Address: 1601 Kanawha Valley Building, Charleston, West Virginia.

[fol. 18a] Certificate of Service (omitted in printing).

[fol. 19] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWER OF DEFENDANT, UNION CARBIDE AND CARBON CORPORATION, A CORPORATION, TO THE COMPLAINT FILED HEREIN AGAINST IT—Filed September 17, 1956

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

A cause of action for injuries does not survive the death of the injured party, as alleged in the second cause of action, where no action has been instituted during the life of the injured party.

[fol. 20] Third Defense

"No suit to recover damages for the death of a human being, caused by negligence, may be maintained in the admiralty courts of the United States under the general maritime law."

Fourth Defense

The provisions of the Jones Act, 46 U.S.C.A. 688, are not available to this plaintiff, as the person whose injuries resulted in death must be a seaman and a member

of the crew; in other words, the act only lies in favor of an employee against his employer, and plaintiff's decedent was not employed by this defendant but by Amherst Barge Company, the third party defendant. 46 U.S.C.A. at page 256.

Fifth Defense

"At the common law no civil action lies for an injury resulting from death."

Sixth Defense

"The maritime law, as generally accepted by maritime nations, leaves the matter untouched."

Seventh Defense

The action cannot be predicated upon the Death on High Seas Act, 46 U.S.C.A. 765 et seq., especially Section 767 thereof, which specifically provides that the act does not apply to "any waters within the territorial limits of any state."

Eighth Defense

If the action is maintainable, which is denied, it is maintainable by virtue of West Virginia Code 55-7-5 (Serial Section 5474) and 55-7-6 (Serial Section 5475). [fol. 21] If this action is maintainable under the West Virginia wrongful death statute, Code 55-7-5,6, no actionable negligence is alleged, which is necessary to support such an action, and the allegation of unseaworthiness will not support the charge of negligence.

Ninth Defense

If the action be predicated upon said provisions of West Virginia Code 55-7-5,6, plaintiff cannot recover because of the contributory and primary negligence of which her intestate was guilty, contributing to, or causing his own death.

Tenth Defense

If the action can be predicated upon said West Virginia wrongful death statute, West Virginia Code 55-7-6,5,

such act carries its own limitation of ten thousand dollars, or at the most twenty thousand dollars, and plaintiff's complaint for any amount in excess thereof should be dismissed before trial, if trial be necessary. "The liability and the remedy are created by the same statutes and the limitations of the remedy are therefore to be treated as limitations of the right."

Eleventh Defense

This action should be dismissed as an improper attempted joinder of alleged causes with respect to the claim for suffering and the wrongful death claim. Such claims are different in nature and in ownership.

Twelfth Defense

Defendant admits the allegations of Paragraphs First, Third, Fourth and Fifth of the complaint filed herein and says that the allegations contained in Paragraphs Second, Sixth and Eighth are now immaterial by reason of the order entered herein on February 23, 1956, dismissing [fol. 22] Carbide & Carbon Chemicals Corporation as a party defendant.

Defendant admits, as alleged in Paragraph Seventh of the complaint that at all times mentioned in said complaint it owned the barge known as CC-204, but avers that it did not have the same under its control at the time of the accident complained of herein as shown in Paragraph 2 of the third party complaint filed herein by this defendant, and further avers that said barge at the time of the accident complained of was in the exclusive care, custody, possession and control of Amherst Barge Company, a corporation, third party defendant herein, for repair.

Defendant denies the allegations of Paragraph Ninth of the complaint, and for want of information and knowledge denies the allegations of Paragraphs Tenth, Eleventh and Twelfth.

Defendant denies that any injury sustained by the deceased, Marvin Paul Goett, as alleged in Paragraph Thirteenth or otherwise, was due to the carelessness, recklessness or negligence of it, or its agents, servants or employees; and denies that there were any officers or

seamen aboard the vessel at the time complained of; and denies that said vessel was in an unseaworthy condition and denies that it was under any duty to keep the same in a seaworthy condition or in a reasonable state of repair with respect to plaintiff's decedent; and denies that it was under any duty to provide said decedent with a safe place to work, and denies that it was under any duty to provide any equipment with reference to said vessel at the times referred to in said complaint, and denies that decedent was caused to fall, or that he did fall, and further denies all allegations with respect to the alleged death of said decedent for want of knowledge and information, and ayers that said barge CC-204 was in shipyard for repair at the time of the death of decedent in the exclusive custody and control of Amherst Barge Company, as appears from the third party complaint filed herein.

[fol. 23] Defendant denies all the allegations of Paragraph Fourteenth, and for want of information and knowledge denies the allegations of Paragraphs Fifteenth, Sixteenth and Seventeenth of said complaint, and further says that the allegations of Paragraph Seventeenth are fatally insufficient in any event under the provisions of West Virginia Code 55-7-5,6.

Defendant further denies all of the allegations contained in Paragraphs Eighteenth and Nineteenth, and all other allegations contained in either the first or second cause of action not hereinbefore specifically admitted.

Wherefore, this defendant denies all liability and responsibility for said accident and alleges that it was free from all negligence and that recovery, if any, to which plaintiff may be entitled is against said third party defendant; and asks to be dismissed with its reasonable costs about its defense in this behalf expended.

Dayton, Campbell & Love, Charles M. Love, Attorneys for Union Carbide and Carbon Corporation, Address: 1100 Security Building, Charleston, West Virginia.

Certificate of Service (omitted in printing).

[fol. 24]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWERS OF UNION CARBIDE & CARBON CORPORATION TO INTERROGATORIES PROPOUNDED TO IT BY PLAINTIFF—Filed May 6, 1957

Question 1. State the place where, the builder and the date that the CC 204 was constructed.

Answer. Neville Island, Pennsylvania, by Dravo Corporation, in February, 1948.

Question 2. State the cost for the construction of the vessel.

Answer. $48,187.40.

Question 3. State whether there was additional equipment and gear on the vessel at the date of the accident complained of herein other than the equipment on the vessel [fol. 25] as originally constructed and, if so, state the additional equipment and its cost and cost of installation aboard the vessel.

Answer. None aboard.

Question 4. State whether any major repairs have been made to the vessel since its original construction and, if so, state the nature of the repairs and the costs thereof.

Answer. Barge CC-204 was damaged July 21, 1951, in collision with Steamship "Velma Lykes" in the Houston Ship Channel. Extensive repairs were made in Texas. Except for such repairs, the cost of which is not readily available, but will be furnished if required, the barge has had normal maintenance with no unusual additions.

Question 5. State the type of power under which the vessel navigated.

Answer. It is a nonself-propelled barge, pushed or pulled by a tow boat.

Question 6. State the dates for the five years previous to the date of the accident complained of herein when the vessel was under the same or similar repair as on said date of accident:

Answer. June, 1952. September, 1950.

Question 7. State the names of the repair companies who performed the work as discussed in the previous interrogatory.

Answer. Marietta Manufacturing Company, Point Pleasant, West Virginia, on both occasions.

Question 8. State the method of delivery of the vessel to the repair company or companies including the Amherst Barge Co., where the vessel was delivered on each occasion and whether the vessel was delivered afloat or in drydock to the respective repair companies.

[fol. 26] Answer. Delivered afloat via towboat.

Question 9. State whether any employee or agent of the Union Carbide & Carbon Corporation was present on or about the vessel in order to inspect the vessel during the period of repair as above stated and, if so, state the name or names of said employee or agent for the five years prior to the date of accident complained of herein and the nature of the duties of said person.

Answer. Fred C. Pritchard, Route 2, Box 211, St. Albans, West Virginia. Title, "Maintenance Engineer for Barges." Duties, Supervisor of Barge Maintenance under Works Engineering Department, and in conjunction with Traffic Department of defendant. During the period of repair at Amherst Mr. Pritchard was not at Amherst Docks until after death of Mr. Goett. On October 7, 1955, Mr. Pritchard inspected the vessel on marine ways and ordered additional minor repairs, not related to the sandblasting being performed by Mr. Goett on October 5, 1955.

Question 10. State whether the vessel carried as part of ship's gear lifeboats, life ropes, life preservers, safeguards, safety ropes, life jackets, life buoys or row boats at any time from the date of construction to the date of accident complained of herein and, if so, state the ship's gear

carried, model of said gear, the dates carried and the location of said equipment aboard the vessel.

Answer. None.

Question 11. If the answer to the above interrogatory is in the affirmative, state the date of purchase of said gear, the costs thereof, the model number of said gear, and the company or companies from whom purchased.

Answer. None.

[fol. 27] Question 12. State the number of employees who manned the vessel during its periods of carriage of cargo and the capacity of each crewman aboard the vessel.

Answer. is an unmanned barge during carriage.

Question 13. State the employees of Union Carbide & Carbon Corporation who were stationed aboard the tow, when a tow was employed to navigate the vessel, and the capacity of each crewman.

Answer. None.

Question 14. State the name and capacity of the official of Union Carbide & Carbon Corporation who was in charge of the operation, management and control of the CC 204 and other vessels owned by Union Carbide & Carbon Corporation and who authorized the purchase of ship's gear for said vessels.

Answer. Mr. R. E. Martin, Traffic Manager. None purchased.

Question 15. State whether said official authorized the p[illegible]chase of the following equipment and, if so, the dates of each authorization and the date of purchase, delivery and installation aboard the CC 204:

(a) life boats
(b) life rafts
(c) life preservers
(d) safety nets
(e) safety ropes
(f) life jackets
(g) life buoys
(h) row boat

Answer. None purchased for installation aboard CC 204.

[fol. 28] Question 16. State whether the Union Carbide & Carbon Corporation will claim that the vessel involved herein was laid up at the time of the accident complained of and, if so, the date that the vessel was so laid up.

Answer. "Defendant admits, as alleged in Paragraph Seventh of the complaint that at all times mentioned in said complaint it owned the barge known as CC-204, but avers that it did not have the same under its control at the time of the accident complained of herein as shown in Paragraph 2 of the third party complaint filed herein by this defendant, and further avers that said barge at the time of the accident complained of was in the exclusive care, custody, possession and control of Amherst Barge Company, a corporation, third party defendant herein, for repair."

Question 17. State whether the Union Carbide & Carbon Corporation will claim that the vessel involved herein was dismantled at the time of the accident complained of and, if so, the date that the vessel was so laid up.

Answer. "Defendant admits, as alleged in Paragraph Seventh of the complaint that at all times mentioned in said complaint it owned the barge known as CC-204, but avers that it did not have the same under its control at the time of the accident complained of herein as shown in Paragraph 2 of the third party complaint filed herein by this defendant, and further avers that said barge at the time of the accident complained of was in the exclusive care, custody, possession and control of Amherst Barge Company, a corporation, third party defendant herein, for repair."

Question 18. State whether the Union Carbide & Carbon Corporation will claim that the vessel involved herein was out of commission at the time of the accident complained of and, if so, the date that the vessel was so laid up.

Answer. "Defendant admits, as alleged in Paragraph Seventh of the complaint that at all times mentioned in said [fol. 29] complaint it owned the barge known as CC-204, but avers that it did not have the same under its control at the time of the accident complained of herein as shown in Paragraph 2 of the third party complaint filed herein by

this defendant, and further avers that said barge at the time of the accident complained of was in the exclusive care, custody, possession and control of Amherst Barge Company, a corporation, third party defendant herein, for repair."

Question 19. State the dates of United States Coast Guard or American Bureau of Shipping inspections of the vessel for the five years preceding the accident complained of herein.

Answer. The barge was inspected annually. The last certificate of inspection prior to the accident was issued April 6, 1955, by United States Coast Guard covering inspection completed April 1, 1955, and photostatic copy of the same is attached hereto showing permission for navigation of unmanned tank barge on rivers, inland waters tributary to the Gulf of Mexico, approved without equipment other than fire extinguishers for period ending April 1, 1956. Amended certificate issued by Coast Guard on October 26, 1955, after dry docking at Reed, West Virginia, is also attached.

Question 20. State the nature and extent of each inspection as discussed in the above interrogatory and the results thereof.

Answer. The nature and extent of such inspection is shown in answer to question 19, including copy of certificate covering inspection attached in answer to said question 19.

Question 21. State whether the repairs to the vessel, to (sic) the contract between the Union Carbide & Carbon Corporation and the Amherst Barge Company were to be performed in drydock or when the vessel was afloat or both for various operations in the repair work.

[fol. 30] Answer. A large portion of the work of painting the entire surface, including bottom and sides, would necessarily require performance in drydock, but details of performance were at the discretion and judgment of third party defendant, which had exclusive control of barge during the performance of the contract, subject only to the specifications thereof.

Question 22. State whether Union Carbide & Carbon Corporation made any inspection of the repair work on the vessel between the date of delivery and the date of the accident complained of herein and, if so, state the name and capacity of the official who so inspected the vessel.

Answer. None.

Question 23. This question was withdrawn by plaintiff.

Question 24. State whether, during the time of minor repairs to the CC 204, there were any employees of Union Carbide & Carbon Corporation aboard the vessel for the purpose of

(1) management
(2) operation
(3) safety
(4) performance of the contract,

during the operation of minor repair to the vessel and, if so, state his name and capacity.

Answer. No employee of Union Carbide & Carbon Corporation was aboard the barge during the time of minor repairs for either (1) management, (2) operation, or (3) safety. Mr. Pritchard was aboard the barge on October 7, and November 5, 1955, and perhaps at other times between said dates, to inspect repairs and alterations, other than [fol. 31] painting. In addition, Mr. J. L. Barker, Jr., Coatings Engineer of the Works Engineering Department of defendant, Mr. C. E. Holley of defendant's Research Department, and Mr. P. N. Zahniser of the Traffic Department, were at Amherst docks, Reed, West Virginia, on October 7, 1955, for the purpose of inspecting the condition of a special painting that had been applied approximately three years previously. Also, Mr. Barker, his technical assistant, Mr. A. L. Gray, and Mr. A. R. Giles were at Amherst docks, Reed, West Virginia, inspecting the painting covered by this contract between October 7, 1955, by which time the barge was on the marine ways and out of the water, and November 7, 1955, when the barge was again launched.

R. E. Martin

Duly sworn to by R. E. Martin, jurat omitted in printing.

[fol. 32]

ATTACHMENT TO ANSWERS

TREASURY DEPARTMENT
U. S. COAST GUARD
CG-841 (Rev 9-48)

FILE NO. YB 1913

This Certificate Expires 1 April , 1949

UNITED STATES OF AMERICA
TREASURY DEPARTMENT
UNITED STATES COAST GUARD

Certificate of Inspection

VESSEL CC-804 OFFICIAL NO. Not documented
CLASS Tank Barge TONS: GROSS 886 NET 665 LENGTH 196'
HOME PORT South Charleston, West Virginia OWNERS Carbide & Carbon Chemicals Company
OPERATORS Carbide & Carbon Chemicals Company, Div. of Union Carbide & Carbon Corp.&c, Charleston, W.Va.

The inspection of the above-named vessel having been completed at South Charleston, West Virginia on the 1st day of April, 1948, I hereby CERTIFY that the said vessel was built at [illegible] in the State of Pennsylvania, in the year 1942, rebuilt in the year [illegible]; that the hull is constructed of steel; is provided with [illegible] staterooms, [illegible] berths; that the said vessel at the date hereof is in all things in conformity with the applicable vessel inspection laws and the rules and regulations prescribed thereunder; and is allowed to carry [illegible] passengers, [illegible] persons in addition to the crew.

The following complement of licensed officers and crew is required to be carried, included in which there must be [illegible] certificated lifeboatmen: UNMANNED

Master	Second Mate	Able Seamen	Chief Engineer	Firemen/Watertenders
1st Class Pilot	Third Mate	Ordinary Seamen	1st Assistant Engineer	Oilers
2d Class Pilot	Inland Mate	Watchmen	2d Assistant Engineer	Motormen Operators
Chief Mate	Radio Officer	Deckhands	3d Assistant Engineer	

and also may carry [illegible] persons when needed in the steward's and other departments not connected with the navigation of the vessel. Total number of persons allowed [illegible].

OFFICERS OR

The said vessel is permitted to be navigated for one year on RIVERS; INLAND WATERWAYS; PINTWATER TO THE GULF OF MEXICO.

DATA, PARTICULARS OF EQUIPMENT AND PERIODIC EXAMINATIONS

Number lifeboats for [illegible] persons	Fire extinguishers, Class A [illegible]	Sounding letter issued [illegible]	BOILERS
Metal lifeboats for [illegible] persons	X Fire extinguishers, Class B II	Date drydocked 29 May 1946	Number Year built
Motor lifeboats for [illegible] persons	Fire extinguishers, Class C [illegible]	Propelled by [illegible]	Kind
Working boats for [illegible] persons	Fire extinguishers, Semiportable [illegible]	Tail shaft drawn [illegible]	Minimum efficiency of weakest longitudinal [illegible]
Liferafts for [illegible] persons	Class [illegible]	[illegible]	Record in Office of [illegible]
Emergency apparatus for [illegible] persons	Fire extinguishers, Fixed [illegible]	Pressure vessels examined [illegible]	Hydrostatic tested [illegible]
Life preservers, adult's [illegible]	[illegible]	[illegible]	[illegible]
Life preservers, children's [illegible]	Fire axes [illegible] Fire pumps [illegible]	[illegible]	Soundings required [illegible]
Wood floats [illegible]	Fire hose, total length [illegible] ft.	Pipe [illegible]	[illegible]
Oyst. line-throwing apparatus [illegible]	Approved and approved for the carriage of [illegible] or combustible liquids of grade "A" [illegible] or 22/1906	[illegible]	Date hydrostatic pressure applied [illegible]
[illegible]	882 FWP) and 1999F 27/946	[illegible]	Maximum steam pressure allowed [illegible]
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	Capacity in barrels 5,430	[illegible]	[illegible]

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA } ss:

/s/
I, R. E. [illegible], CGM, USCG, 386-0
(Officer in Charge, Marine Inspection)

Subscribed and sworn to before me this 8th day of April, 1948, by R. E. [illegible]
(Sworn or affirmed) (Officer in Charge, Marine Inspection)

/s/
R. W. [illegible], LCDR, USCG
Authority, 60 U.S.C. 788

Engineer CG 841 (Rev 10-41) CG-841A, CG-848, CG-848A, CG-848, CG-848A, CG-849, and CG-847 which forms are obsolete

[fol. 33] ATTACHMENT TO ANSWERS

File No. V TB-1912

CERTIFICATE AMENDING CERTIFICATE OF INSPECTION BY CHANGING CHARACTER OF VESSEL, ROUTE, EQUIPMENT, ETC.

UNITED STATES COAST GUARD
MARINE INSPECTION OFFICE
PORT OF Huntington, West Virginia

DATE 26 October 1955

THIS CERTIFIES, That the following-described amendments are hereby authorized in the certificate of inspection expiring on 1 April, 1956, issued to the tank barge vessel named CC-204 Off. No. ..... of 593 gross tons, home port South Charleston, West Virginia classed as Tank Barge, built at Neville Island in the State of Pennsylvania, in the year 1948, and certificated at Huntington, in the State of West Virginia

namely: Vessel Drydocked at Reed, West Virginia
13 October 1955

2-year survey completed
SubC. "D" Sec. 31.10-20 (a) (2)

/s/ W. H. FULLER, CDR., USCG
Acting Officer in Charge, Marine Inspection.

The original of this certificate will be delivered to the master or owner of the vessel to which it relates, which certificate must be framed under glass and posted on board near the certificate of inspection or examination, if the certificate of inspection or examination is required to be posted; or kept on board with the original certificate of inspection or examination, if the certificate of inspection or examination is not required to be posted, to be shown on demand.

One copy of this certificate will be delivered to the chief officer of customs of the district in which the copy of the original certificate of inspection or examination was filed.

One copy of this certificate will be filed with the copy of the certificate of inspection or examination that it amends in the office of the Officer in Charge, Marine Inspection.

Any additional equipments required must be stated herein.

Certificate of Service (omitted in printing).

[fol. 34] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

AMENDMENT TO ANSWER OF DEFENDANT, UNION CARBIDE AND CARBON CORPORATION, A CORPORATION, TO THE COMPLAINT FILED HEREIN AGAINST IT—Filed May 13, 1957

THIRTEENTH DEFENSE

The defendant says that the plaintiff cannot recover upon its said supposed cause of action herein for the additional reason that the same is barred by the assumption of risk incident to plaintiff's decedent's employment by commencing and continuing the work which he was performing at the time of his death with full knowledge of the facts, circumstances and conditions surrounding the same whereby he assumed the risks incident thereto.

Wherefore, this defendant again denies all liability and responsibility for said accident, if any, and alleges that defendant was free from all negligence and that recovery, if any, to which plaintiff may be entitled is against the third-[fol. 35] party defendant, and again asks to be dismissed with its reasonable costs about its defense in its behalf expended.

Dayton, Campbell & Love, Charles M. Love, Attorneys for Union Carbide and Carbon Corporation, Address: 1100 Security Building, Charleston, West Virginia.

[fol. 36] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

AMENDED AND SUPPLEMENTAL ANSWER OF AMHERST BARGE COMPANY, A CORPORATION—Filed May 13, 1957

In addition to the defenses heretofore set up, the third-party defendant avers these further defenses:

1. If either the defendant Union Carbide & Carbon Corporation, a corporation, or the third-party defendant was guilty of any negligence causing or contributing to the death of the decedent, Marvin Paul Goett, then this third-party defendant avers that the said Marvin Paul Goett was also guilty of contributory negligence which proximately caused or proximately contributed to his death and bars this cause of action.

2. This third-party defendant further avers that the said decedent assumed the risks incident to the employment [fol. 37] in which he was engaged at the time of his death and that his death grew out of these risks and that therefore under the doctrine of assumption of risk that this cause of action is barred.

Jackson Kelly Holt & O'Farrell, W. T. O'Farrell, H. D. Johnson, Attorneys for Amherst Barge Company, a corporation, Address: 1601 Kanawha Valley Building, Charleston, West Virginia.

[fol. 38] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWERS OF AMHERST BARGE COMPANY TO INTERROGATORIES PROPOUNDED TO IT BY PLAINTIFF—Filed May 13, 1957

1. State the first date of employment of Marvin Paul Goett, deceased, by the Amherst Barge Company.

January 7, 1954.

2. State whether said deceased was steadily employed since that first date by the Amherst Barge Company until the date of his death and the capacity in which he was so employed.

No. He was employed January 7, 1954, to April 30, 1954, and was laid off until April 21, 1955, when he was re-employed and continued working until the date of his death.

3. State the daily wages of said deceased and his total wages earned from the first date of employment until the date of his death.

[fol. 39] His daily wage at the time of his death was $14.98. His total wages earned during all periods of employment by Amherst Barge Company was $2,510.14.

4. State the duties of said deceased on the date of his accident and subsequent death.

Sandblasting.

5. State the date that the vessel CC-204 was delivered to the Amherst Barge Company.

October 1, 1955.

6. State the place where the vessel was delivered and whether said vessel was afloat or in drydock at the time of delivery.

Reed, West Virginia, afloat.

7. State whether the vessel was afloat or in drydock at the time of the accident and death of the deceased.

Afloat.

8. State the date on which the vessel was first placed in drydock during the repair operation on which the accident and death complained of herein occurred.

The vessel was not placed in drydock during the repair operation; but it was placed on a side haul marine railway on October 7, 1955.

9. State whether it was customary for Amherst Barge Company to drydock the vessel immediately upon delivery for the purpose of repairing, sandblasting and painting of the CC-204, or whether it was the custom of Amherst Barge Company to proceed with the repairing, sandblasting and painting operation as much as was possible while the vessel was afloat.

There was no "custom" in this regard; but, generally, it was the practice to do as much repair work as possible while vessels were still afloat.

[fol. 40] 10. State whether the Amherst Barge Company ever previously contracted with Union Carbide & Carbon Corporation for similar repairs on similar vessels, and, if so, state the dates of such contracts for the five years previous to October, 1955.

Yes, Purchase Order No. 514-73361, for Barge CC-206, May 12, 1955.

11. State whether the vessels involved in the previous interrogatory were delivered by Union Carbide & Carbon Corporation to the Amherst Barge Company afloat or in drydock for each of the periods as set forth in the preceding interrogatory.

Afloat.

12. State the date and time of day that the CC-204 was inspected by the Amherst Barge Company and the name and capacity of the party who inspected the vessel.

On October 2nd, at 10:30 A.M., Rex Buckley, an independent inspector, made a gas examination of the barge and rendered a gas free certificate, for which services he was paid by Amherst. On October 3rd, Frederick P. Martin, Amherst's superintendent of maintenance, went on board the barge in company with Mr. Fred Prichard of Carbide, and examined the barge and discussed the work to be done

on the barge. Other supervisory personnel were on board for various purposes from time to time, from that time on.

13. State whether on said inspection the following life-saving equipment was aboard the vessel as part of the gear and appurtenances of said vessel:

(a) lifeboats; (b) life raft; (c) life preserver; (d) safety nets; (e) safety ropes; (f) life jackets; (g) life buoys.

[fol. 41] No such equipment was board the boat as part of its gear and appurtenances.

14. State whether the superintendent or supervisor of the Amherst Barge Company dock area was aboard the vessel at any time prior to the death of the deceased and while the deceased was engaged in the performance of his duties aboard the vessel, and if so, state the date and the purpose of boarding said vessel.

Yes, from October 3rd on, at frequent intervals each day, for varied purposes pertaining to the work in progress.

15. State whether, at any time prior to the accident and death of the deceased, Amherst Barge Company had available for the health and safety of its employees aboard vessels afloat in the river the following equipment:

(a) lifeboats; (b) life raft; (c) life preserver; (d) safety nets; (e) safety ropes; (f) life jackets; (g) life buoys

Life rings were located on the "digger" boat and tow boats. Life jackets were located in supply house and on tow boats. Yawls and life boards were on tow boats, and there was another yawl at the Reed dock. There were two "caulking flats" at the Reed dock.

16. If any subdivisions of interrogatory 15 were answered in the affirmative, state the quantity of said equipment available, the name and model number of said equipment, the date purchased and the company purchased from.

Life jackets were "TA-PAT-CO", model No. 206, purchased from American Pad and Textile Company, Greenfield, Ohio, at varying times when replacements were

needed. Life rings were 30 inches, with approximately 75 feet of line attached, purchased from Capital City Supply Company, Charleston, West Virginia, at varying times, USCG approved. Make and model of other equipment is not ascertained.

[fol. 42] 17. If any subdivisions of interrogatory 15 were answered in the affirmative, state where said equipment was storaged by the Amherst Barge Company and the distance in feet from the place of storage and the position of the CC-204 at the time of the accident and death of the deceased.

Approximately 100 life jackets were located in the supply house, approximately 250 feet from the CC-204. There was a life ring and attacked line on the "digger" boat approximately 35 feet from CC-204. There was a "caulking flat" along side the CC-204. There was a yawl approximately 250 feet from the CC-204.

18. If any subdivisions of interrogatory 15 were answered in the affirmative, state whether the deceased was instructed by the Amherst Barge Company in the use of said equipment and, if so, state t.. date or dates of said instruction and the person by whom the instruction was given.

The use and location of safety equipment was a matter of general knowledge and observation and was the subject of universal discussion by and between all employees and supervisors.

19. If any subdivisions of interrogatory 15 were answered in the affirmative, state whether the deceased was given said equipment for his health and safety on the date of his accident and death.

Such equipment was furnished to him and was available to him for his use.

20. If any subdivisions of interrogatory 15 were answered in the affirmative, state whether the Amherst Barge Company had in force and effect a policy of enforcement of the use of said equipment by its employees going aboard vessels afloat in the river and, if so, what arrangements by way of supervision and inspection did the Amherst

Barge Company have as company policy for said enforce
[fols. 43-48] ment.

Life jackets were furnished to and were available for use of any and all employees. Mandatory use of such equipment had been a long standing subject of discussion and negotiations between the Company and the Union.

21. If any subdivisions of interrogatory 15 were answered in the affirmative, state whether said equipment was placed aboard the CC-204 at any time from the delivery of said vessel by Union Carbide & Carbon Corporation up until the moment of the accident and death of the deceased.

No.

W. F. Miller, As Secretary of Amherst Barge Company.

Duly sworn to by W. F. Miller, jurat omitted in printing.

[fol. 57] [File endorsement omitted]

[fol. 58]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
at Charleston

No. 1755

ELLEN GOETT, as Administratrix of the Estate of Marvin Paul Goett, deceased, Plaintiff,

v.

UNION CARBIDE & CARBON CORPORATION, a corporation, Defendant and Third-Party Plaintiff,

v.

AMHERST BARGE COMPANY, a corporation, Third-Party Defendant.

Transcript of Proceedings—May 13, 1957

Tried before Honorable Ben Moore, United States District Judge, on the 13th day of May, 1957.

APPEARANCES:

Mr. Harvey Goldstein, Mr. E. Franklin Pauley (Pauley & Andrews), and Mr. S. Eldridge Sampliner, counsel for plaintiff.

Mr. Charles M. Love (Dayton, Campbell & Love), and Messrs. William Carter and R. M. Brown, counsel for Union Carbide & Carbon Corporation.

Messrs. W. T. O'Farrell and David D. Johnson (Jackson, Kelly, Holt & O'Farrell), counsel for Amherst Barge Company.

* * * * * * * * *

[fol. 62] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Johnson: Your honor, we have an amended and supplemental answer which clarifies the matter of contributory negligence and which would add as an additional defense the defense of assumption of risk.

* * * * * * *

[fol. 66] The Court: And we are going to permit the filing of the defense of assumption of risk and we are going to rule that a defense of contributory negligence and assumption of risk are both available in this case if they are shown.

* * * * * * *

Mr. Goldstein: At this time, sir, I would like to move that your honor rule on this matter on the question of damages in an alternative ruling.

The Court: I will overrule your motion. We have gone into that. We spent a whole day in pretrial conference in which I told you that there would be no rulings prior to the trial of the case other than were necessary to define the issues, and this is just simply a wrongful death case being tried under the admiralty rules but with all the substantive law of the state applicable to it.

* * * * * * *

[fol. 67] The Court: I am ready for your opening statement. Go ahead, gentlemen.

Mr. Goldstein: . . .

. . . . . .

[fol. 68] He had evidently fallen overboard. How or why is completely unknown. There is absolutely no evidence and no proof I believe will be offered by either side to establish how or why Marvin Goett fell off the vessel.

. . . . . .

[fol. 71] Mr. Goldstein: . . . The action is brought solely on the doctrine of unseaworthiness.

. . . . . .

[fol. 75] STATEMENT OF MR. JOHNSON

Mr. Johnson: I am speaking for Amherst now but necessarily I think our position is that if Carbide was not guilty of fault in this matter and there can be no recovery against Carbide, that there can be no recovery against Amherst, because the only possible basis for recovery against Amherst, as we see it, is on the theory of indemnification of Carbide and Amherst is protected by its coverage under the Longshoremen's and Harbor Workers' Compensation Act, which provides that the benefits provided by that act shall be the sole liability of the employer for the death or injury of its employes.

The Court: Who was employing Goett?

Mr. Johnson: Amherst. He was our employe, and as to any recovery by the administrator against us directly, we are protected, we maintain, by our coverage under the Longshoremen's and Harbor Workers' Compensation Act.

[fol. 76] As to Amherst, our only liability in this case as we see it can arise through an implied or express contract to indemnify Carbide for any liability that they may have on account of the death of our employe.

The Court: I think you should explain this definition of coverage under the longshoremen's act. I don't know that I understand that.

Mr. Johnson: Your honor, Amherst, Mr. Goett's employer, is covered—that is, it has provided the coverage which the law requires for its employes who are within the application of the Longshoremen's and Harbor Workers'

Act. That act provides that upon the death or injury of one of Amherst's employes the benefits which the act provides and which the act requires Amherst to afford to the injured workman or his beneficiaries, that that shall be the sole liability of the employer for the injury or death of that employe.

We think it clear from the facts of this case and the nature of Mr. Goett's employment that he was within the coverage and application of the Longshoremen's and Harbor Workers' Compensation Act.

We, in fact, represent the Amherst Barge Company's insurance carrier which provided the longshoremen's coverage applicable to this matter. We have at all times taken [fol. 77] the position that the case was within the application of the longshoremen's act. We stand ready at any time to honor this claim to the full extent of our obligation under that law.

. . . . . .

[fol. 78] Mr. Johnson: There is a whole line of these cases which have, I think, established the doctrine so far as unseaworthiness is concerned that if the owner of the vessel is liable, if, as I say, its liability arises not from its own active fault but arises simply by imposition of law on the active fault of the independent contractor, then he may recover from the employer, the independent contractor, despite that provision of the longshoremen's act which says that the benefits provided by that act shall be the sole measure of sole liability against the employer.

. . . . . .

[fol. 79] Mr. Johnson:

. . . . . .

It is our position that he assumed not only the ordinary risks of his employment but the extraordinary risks of his employment insofar as they were known to him, including the negligent failure, if any, of his employer or the owner of the vessel to provide him with a safe place to work, which as I understand it is the heart and essence of the plaintiff's case here.

. . . . . .

[fol. 81] We will rely on the proposition of law that from the time that this barge was turned over to Amherst, at least, that Carbide cannot be held liable for the neglect or fault of Amherst in anything that was done, if there was any such fault or neglect, which we deny; that therefore the failure to rescue and the failure to provide rescue equipment, which Mr. Goldstein apparently makes a great deal of and which is apparently the heart and essence of his case, cannot make Carbide liable in this case to the plaintiff.

. . . . . .

[fol. 85] STATEMENT OF MR. O'FARRELL

Mr. O'Farrell: Under the provisions of the Longshoremen's and Harbor Workers' Act, to which Amherst was a [fol. 86] subscriber, a recovery by the injured employe or by the estate of the injured employe inures to the benefit of the employer or the employer's insurance carrier to the amount of that recovery. In other words, if there is a recovery here that recovery, less the attorney's fee, will inure to the benefit of Amherst or its insurance carrier.

Furthermore, if it is pertinent in this case we can show —and by "we" I mean the defendant Amherst and the insurance carrier covering Amherst—that the insurance carrier's actuaries have determined that from an actuarial standpoint the recovery which will be made by the beneficiaries of the decedent's estate will exceed $20,000.

The importance of that statement is obvious to his honor. His honor has held that there cannot be a recovery, if there is a recovery in this case, in excess of $20,000, the amount of limitation of the wrongful death statute of the State of West Virginia.

I repeat that it is my conclusion—and I think counsel for the plaintiff ought to correct me if I am wrong—that if there is a recovery in this case it cannot under your honor's ruling exceed $20,000. If it cannot exceed $20,000, then all we really are debating over here is an attorney's fee because from that recovery, of course, will be deducted the [fol. 87] amount of the attorney's fee of plaintiff's counsel. The remainder of the recovery, if there is one, will be given as a credit to Amherst's insurance carrier against the

amount which Amherst's insurance carrier will owe to the widow and the children of the decedent.

. . . . . .

[fol. 92] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: I am not going to permit you to recover on the basis of some default of Amherst for which you are compensable under the Longshoremen's and Harbor Workers' Act and then recover against Carbide for the same thing and then say that because of this imputed liability of Carbide that Amherst's insurance carrier is not entitled to any credit.

Mr. Goldstein: We don't say that at all. If I have given [fol. 93] you that impression, I am sorry. There is no question but that any amount that we recover from Union Carbide and Carbon less attorney's fee must go as a credit to the insurance carrier.

. . . . . .

[fol. 94] Mr. Goldstein: At this time I would like to move to place in the record the entire complaint and trial memorandum of the libelant. I would like to enter into the record all of the pleadings that have heretofore been filed in the civil action which is now an admiralty action for the first time today, including the answers of both Union Carbide and Carbon Corporation and Amherst Barge Company to interrogatories propounded to them by the plaintiff.

. . . . . .

[fol. 103] Mr. O'Farrell: Your honor, I think the method the court has indicated is clearly applicable for this reason. Counsel for Amherst has stated in open court as part of the opening statement that it is local counsel for the Travelers Insurance Company, which carries the harbor workers' [fol. 104] and longshoremen's compensation on the decedent, that the Travelers Insurance Company has recognized the validity of the decedent's estate's claim, that its actuaries have computed the benefits, that the actuarial computation shows that based upon statistics and actuarial statistics that the payments to the estate of the decedent or the dependents of decedent will exceed the sum of $20,000 —I say the sum of $20,000, which is the maximum that your

honor has ruled can be recovered in this action, and therefore under your honor's ruling this action concerns itself solely with one question, and that is the attorney's fee that counsel for the plaintiff may derive from this action, because there is no question but that the amount of recovery in this action, if there were a recovery on behalf of the plaintiff, would first be credited, less the attorney's fee, upon the amount that Amherst or its insurance carrier owes to the beneficiaries of the decedent, and therefore—

The Court: What you are saying about the only controversy being over attorney's fee applies to the trial court.

Mr. O'Farrell: Yes, your honor.

The Court: In the appellate court, of course, there is a very different controversy, which is whether or not there is a limitation on the recovery.

[fol. 105] Mr. O'Farrell: I agree with your honor. As I understand the facts that are not admitted in the opening statements, that is the only item of controversy in this matter. That is, whether or not the plaintiff's recovery, if the plaintiff makes one, is limited to a maximum of $20,000; and I take it that if the procedure outlined by your honor is followed, that that will be the primary issue presented in the appellate court.

The Court: Not the only issue. I have passed on three matters so far: one, that the limitation of $20,000 in the West Virginia statute is applicable here; two, that the defense of contributory negligence if proved is a complete bar; three, that the defense of assumption of risk may be made, and if proved that that is a complete bar.

. . . . . .

[fol. 107] The Court: I don't so interpret it. I think that I would be going outside my judicial office if I should pass on what would be the damages under a theory of law that I believe is not applicable to the case.

. . . . . .

[fol. 129] The Court: I am going to hear argument on that later before I finally dispose of it, so I think now we are up to the point of your introducing your evidence to maintain the unseaworthiness of the vessel and the extent of the damages.

. . . . . .

[fol. 131] ROBERT M. RIGGALL called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and speak loud.
The Witness: Robert M. Riggall.

Direct examination.

By Mr. Pauley:

Q. Will you state your name, please?
A. Robert M. Riggall.
Q. Where do you live, Mr. Riggall?
A. At 3521 Hatfield Drive.
Q. What is your occupation?
A. Machinist helper.
Q. For whom do you work?
A. Amherst Barge.
Q. What age are you, Mr. Riggall?
A. Thirty-five.
Q. How long have you worked for Amherst Barge?
A. Ever since they taken over from Hatfield Campbell's Creek. I have been with the company for nine years.
Q. Mr. Riggall, directing your attention to October the 5th, 1955, where were you working then?
A. Working on the barge.
[fol. 132] Q. Which barge was that you were working on?
A. I don't remember the name of it. It was a steel barge we were working on for Carbide.
Q. Where was that barge located?
A. It was in the river at the foot of the road that goes down to the digger boat.
Q. And what place is that, at Reed?
A. The docks at Reed, the lower dry docks.
Q. If you remember, where was that dock moored?
A. It was moored to the digger boat and the digger boat was moored on the bank, fastened to the bank.
Q. The digger boat, was that down the river from the barge?
A. Down the river inside.

Q. Was there any free space between the digger boat and the barge, if you remember?

A. Enough to float the barge. Enough water to float the barge. I couldn't say how much.

Q. Was the barge entirely afloat in the river?

A. Yes, sir.

Q. Both the front end and the back end. Is that right?

A. That's right.

Q. Or the upriver side and downriver side?

[fol. 133] The Court: Do I understand this thing you call a digger boat is not in the water?

The Witness: Yes, it is in the water but it is more stationary. It stays at one place.

The Court: You said there was enough water in between there to float the barge. Any space was enough.

The Witness: What I meant, the barge was far enough out from the bank. It was not on the dry bank. There was water under the barge at all times.

The Court: Now you are talking about a space between the barge and the bank. Mr. Pauley asked you about space between the digger boat and the barge.

The Witness: On the end?

By Mr. Pauley:

Q. That's right.

A. It was tied. I misunderstood you. It was tied to the digger boat, pulled in against it.

Q. Was it entirely flush with it?

Q. You mean was it even?

Q. Yes, was there any free space between there?

A. I don't know about that, how much would be free space between them. I know it was butted up against it, tied up to it.

Q. And it was entirely afloat in the river, the barge?

[fol. 134] A. Yes.

Q. How high was that barge, the deck of the barge, from the surface of the river?

A. I think about nine feet.

Q. Will you describe to the court the type of barge it was with reference to the deck?

A. It was a flat top cargo barge with about a six inch crown.

Q. It was a solid top barge. Is that correct?

A. What?

Q. It had a solid top?

A. That's right. It had hatchways in it.

Q. Did it have any other equipment or fixtures on it?

A. Pipelines.

Mr. Love: I can't hear. I am sorry.

A. Pipelines.

Q. Mr. Riggall—

The Court: By six inch crown you mean it is six inches higher in the center than on the sides?

The Witness: Yes, slopes to both sides.

The Court: All right.

Q. Mr. Riggall, directing your attention to about 1:00 o'clock on the 5th day of October, do you recall who was on [fol. 135] the deck of that barge on that day?

A. I can recall some of them. I don't know whether I can recall them all or not.

Q. Who was there?

A. Harold McCormick, Homer Schultz and Tommy Hammons and myself.

Q. What were you doing on that barge?

A. What was I doing?

Q. Yes.

A. I was cutting Butterworth hatches.

Q. You say you were cutting Butterworth hatches. What were you cutting them with?

A. I was cutting holes in the top of the deck that the hatches go in. We were putting in new hatches.

Q. And you are a welder, are you?

A. Well, I do welding work. I was doing cutting work that day with a torch.

Q. Do you remember seeing Mr Goett on that barge?

A. Yes, sir.

Q. When did you see him and where was he located when you saw him?

A. Well, when I saw him I would say he was approximately the center of the barge, the last time I saw him.

[fol. 136] Q. When did you next see him after that?

A. When he was in the river, when I looked over the side of the barge.

Q. Will you describe to the court just what you saw happen there and what you did?

A. Well, we were cutting the hatchways in the barge. I heard the hose pecking against the side of the barge.

Q. Which hose was that?

A. That's the sandblasting hose.

Q. And Mr. Goett was sandblasting, was he?

A. Yes, sir.

Q. All right, sir. Go ahead.

A. I looked around. They generally peck like that when they want more sand, and I just happened to look around and saw the hose was over the side of the barge.

Q. Where was that located on the barge? Where did you see the hose over the side of the barge?

A. About the quarter bit. That's quarter way back on the barge from the upper end.

Q. Taking this diagram here, assume that this is the digger boat here, this arrow points down the river. Were you on the downriver end of the barge?

A. May I show you on that?

[fol. 137] Q. Yes, sir. Come over here and show me.

A. I was approximately along here. (Indicating on blackboard.)

Q. You were on the barge up the river about a quarter of the way? Is that correct?

A. Yes. I would say I was a quarter of the way on the inside, on the bank side.

Q. Where was Goett?

A. The last time I saw him he was approximately here in the center of the barge.

Q. That's up the river from you?

A. Up the river.

Q. And how far from the upriver end of the barge?

A. Well, I couldn't say. It was, I would say it was a quarter way back the length of the barge.

Q. And do you know the length of the barge?

A. No, sir.

Q. Would you estimate the length of that barge?

A. 200 feet.

Q. All right, sir. And you say you heard the nozzle of the sandblaster hitting the boat, is that right, the side of the boat?

A. Yes, sir.

[fol. 138] Q. What did you do then, if anything?

A. I looked around and saw the hose over the side of the barge, so I run up, I got my cousin Harold A. McCormick. We went up that way and looked over the side and Goett was in the water. Harold went over the side after him. I run to the other side to get a piece of rope or something to throw down to them. Well, there wasn't nothing and so I come back and he had McCormick and they both were going down, down in the water.

Q. That's McCormick and Goett?

A. That's right, McCormick and Goett. So I jumped over the side to try to save one or the other of them, tried to get them apart, to get them back up on the surface.

Q. Now, when you ran over there or went over to the side and saw Goett in the water, what did you observe if anything about his actions in the water?

A. Well, he was paddling in the water, what we call dog fashion, just clawing at the water like that. (Indicating)

Q. Did you observe whether he was swimming or entirely collected, or what was your observation, if anything, about his condition there?

A. All I could say he was either fighting at the water or pawing at the water like he was trying to swim.

Q. And you saw Harold McCormick dive in after him?

[fol. 139] A. Yes, sir.

Q. What did you say happened then? Did McCormick get him or not?

A. McCormick had hold of him and when I got back to that side they both seemed to be in a clinch and seemed to be going down, so I thought I had better get in and try to help them.

Q. And you dove in, then, to get them?

A. Yes, sir, and just as I hit the water I guess the force of that or my weight broke them apart and Goett threw his

arm across my face and he seemed to reach his arms up and slide away.

Q. Went beneath the surface?

A. Yes.

Q. What if anything did you do after that?

A. What did I do?

Q. Yes.

A. Got over to the side of the barge, reached the barge. There was a wearing strip.

Q. What is a wearing strip?

A. It is a piece of metal they put on the side of the barge to keep the lock walls from wearing the barges.

Q. How wide is that?

A. I think they are five and a half inches, about two [fol. 140] foot long. They can be two foot. We have made them longer.

Q. How are they affixed to the side of the barge?

A. They are welded.

Q. You say you were holding onto the wearing strip?

A. Yes.

Q. How much of a hold could you get on that wearing strip, if any?

A. I would say approximately half to five-eighths of an inch thick.

Q. Will you just show how you had hold of that wearing strip?

A. Approximately like that. (Indicating)

Q. About the first joints of your fingers?

A. Yes.

Q. Where was McCormick when you were holding onto the wearing strip?

A. He was right above me, on the same strip above me. He was up the river side from me. I was below him.

Q. I believe you said that you looked for a rope to throw in to them before you went into the water. Is that correct?

A. Yes, sir.

Q. Were you able to find anything in the nature of a rope or throw line?

[fol. 141] A. No, sir.

Q. You know what a ring buoy is, don't you, Mr. Riggall?

A. Yes, sir.

Q. What is that, Mr. Riggall?

A. It is a round buoy. It is made out of cork covered with canvas and has a rope laced through that, and another rope is tied to that, another length of rope.

Q. Were there any such ring buoys on that barge?

A. No, sir, not on the barge. There was one on the digger boat.

Q. How far was the digger boat from you at the time?

A. The length of the barge, but it was tied at the low end of the barge. It would be the length of the barge away.

Q. I believe you said that barge was approximately 200 feet long.

A. 200 feet.

Q. And you were on the upper quarter part. Is that correct?

A. Yes, sir.

Q. Did you know about the ring buoy being located on the digger boat?

A. Yes, sir.

Q. Did you attempt to get to that ring buoy?

[fol. 142] A. No, sir, I never thought about it.

Q. Had you had any specific instructions relative to the lifesaving equipment on the digger boat?

A. No, sir, not other than just knowing it was there.

Q. Were there any throw lines of any type on that barge?

A. No, sir.

Q. Was there any other livesaving or rescue equipment on the barge itself?

A. No, sir.

Q. Where you men were working?

A. No, sir.

Q. If you know, did Mr. Goett have a life jacket?

A. No, sir.

Q. Tell me how were you clothed that day on the barge.

A. You mean myself?

Q. Yes, sir.

A. I had on a pair of overalls, blue shirt, a pair of hard toed work shoes.

Q. Did you strip before you went into the water or did you dive in with your clothing?

A. No, sir, I dived in just as I was. I didn't dive. I jumped.

Q. Did anyone else on that barge while they were work-
[fol. 143] ing there have a life jacket?

A. No, sir.

. . . . . .

[fol. 145] The Court: Maybe so, but you are asking him whether he, the witness, has in the past been in the habit of wearing life jackets in his work. I fail to see the connection between that and a claim for unseaworthiness on the part of the vessel.

. . . . . .

[fol. 148] By Mr. Pauley:

Q. How many days did you work on that barge before the death of Mr. Goett?

A. Two, I believe, the best I can remember.

Q. And do you recall—

A. It was the second day that it happened. That would have been my second day. One day before.

Q. Was that a full eight hour day?

A. I don't remember.

Q. The first day? If you remember, was there any life-saving apparatus whatsoever on that barge?

A. No, sir, not as I recall.

Mr. Love: We would object to that question and move to strike the answer because there is no showing that there is any lifesaving equipment required to be on an unmanned barge.

The Court: I think that the description of the barge has been introduced and it is a question of fixing a standard [fol. 149] for what equipment should be on that kind of a barge. I take it that this will be followed up by further evidence. Overruled.

By Mr. Pauley:

Q. If you remember, were there any lines around the edge of that barge?

A. No, sir.
Q. On the water side?
A. No, sir.

Mr. Love: The same objection.

Q. If you remember, were there any skiffs or boats moored close to the barge?

Mr. Love: Same objection.
The Court: Overruled.

A. By close, how close do you mean?
Q. Tell me where the closest one was located.
A. I would say up the lower end of our fleet. It is a thousand feet.
Q. Away from the barge?
A. Yes, sir, up the river side.

The Court: Any ropes? You may have been asked that. I don't remember.
The Witness: Any ropes on the barge?
The Court: Yes.
[fol. 150] Mr. Love: Same objection.
The Witness: Just what it was tied with.
The Court: That is, no loose ropes?
The Witness: No, sir.

By Mr. Pauley:

Q. Well, now, is it a fair statement, Mr. Riggall, to say there was absolutely no lifesaving equipment such as ropes or anything else on that barge?

A. As far as I saw, none.

Examination by the Court:

Q. Was there any type of railing or raised gunwale on the barge?

Mr. Love: That would be the same objection.
The Court: Yes.

A. You mean on the outer edge?

Q. On the outer edge.

A. No, sir.

Q. There was just a flooring on the top of the barge which slanted six inches altogether from the center and went [fol. 151] right out flush with the side?

A. Yes, sir, and there is a pipeline goes down the middle. That's the only raised place on the barge.

Q. Was there anything to indicate other than just the sight of your eyes when you were getting close to the edge?

A. No, sir, not unless you would happen to have been close to a kevel.

Q. What is that?

A. That's what they tie the barge with.

Q. Is it a post?

A. Most have posts, but these had kevels. They are long pieces of metal. I don't know exactly how to explain it, but they sit in ten or twelve inches from the edge of the barge. There is four of them, I believe, spaced on the barge.

Q. Are they raised up?

A. Yes, sir, they tie ropes around them. I would say approximately eight inches, six to eight inches.

Q. There are only four the entire length?

A. The best I can remember I think that's what it is.

Q. Four on each side?

A. Yes, sir, four on each side.

The Court: That means they would be about fifty feet apart, something like that.

. . . . . .

[fol. 152] By Mr. Pauley:

Q. Mr. Riggall, I show you a picture of a barge afloat in the water. Is that the same type barge, if you recall, that you were working on that day?

A. Yes, sir.

Q. And is that barge loaded or empty in that picture, if you can tell?

A. Well, to look at it I would say the barge was loaded.

Q. And how high did the deck of that barge float from the surface of the water when you were working on it that day?

The Court: I think he said nine feet.

A. Nine feet. Here is what I was talking about, the kevels.

Q. Point out to his honor there the kevels on that and the number of them on that barge.

A. (Indicating to the court.)

The Court: On this barge there are a good many more of those than you said were on the other barge?

The Witness: We have them on our barges. I guess we [fol. 153] have four on our barges. We have the double timberhead, the quarter bit, then the center bit, then another quarter bit, then a double timberhead. That's the way our barges are made up and that's what I was going on. When I went on the barge I went on to cut and didn't pay any attention to how many it had on it, but I do know it had kevels on it.

The Court: This is not a picture of the identical barge?

The Witness: It is an identical barge. What I was talking about was our barge, our coal barges. That's what I was going by.

Mr. Goldstein: If your honor please, this is the identical barge except that this was loaded when these pictures were taken.

OFFER IN EVIDENCE

The Court: Are you introducing that in evidence?

Mr. Goldstein: Yes, sir.

Mr. Love: That is not an exactly accurate statement. It was partly loaded, I think, then.

The Court: This picture will be admitted in evidence.

Mr. Pauley: Plaintiff's Exhibit Number 1.

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[fol. 154] Cross examination.

By Mr. Johnson:

Q. Mr. Riggall, you say that you did know that there was a life preserver ring on board the digger boat?

A. Yes, sir.

Q. You had seen it there, I take it.
A. I had seen it there several times.
Q. And you knew where it was located?
A. Yes, sir.
Q. But at the time Mr. Goett fell in the water I believe you said that the thought never occurred to you to go get that particular ring.
A. No, sir, it didn't.
Q. You never thought of that ring?
A. No, sir.
Q. If you had thought of it, you could simply have moved down the barge to the digger boat and have obtained it without any difficulty. Isn't that true?
A. Yes, sir. There was nothing in the way.
Q. And I believe you said that there was a ladder there.

[fol. 155] Mr. Pauley: I didn't hear that answer.
The Witness: I said no, sir, there wasn't nothing in the way. He asked me if I could go through the barge and to the digger boat. I could.

Q. I believe you said, Mr. Riggall, that there was a ladder you had to go down to get from the barge.
A. The best I remember there was a ladder.
Q. How many steps were there?
A. I would say not over eleven. I think they are eight inch centers, I believe, as much as I can remember.
Q. Wasn't it only a short distance between the elevation of the deck of the digger boat and the elevation of the deck of the barge?
A. Yes, sir. I would say not over five to six feet.

The Court: How long would it have taken you to go from where you were to the buoy, get it, bring it back?
The Witness: That would be hard to say accurately. Not over a minute at the most, I would say, running; a minute and a half.
The Court: Could you have done it within the length of time that you spent on the deck trying to find something?
The Witness: Yes, sir. I would say I could because I went to the upper end of the barge and back and looked [fol. 156] around. I would say I could.

The Court: Now, tell me what this buoy is.

The Witness: You mean describe it to you?

The Court: Yes.

The Witness: It is a round type made out of cork, covered with canvas, and it has a rope lacing around it and then in that rope lacing there is laced most of the time a fifty to a seventy-five foot rope, and when you throw it you hold to the rope.

The Court: It is really a life preserver that you throw to somebody in the water and hold the rope and the person in the water grabs the ring and that keeps them from sinking?

The Witness: That's right.

The Court: All right.

By Mr. Johnson:

Q. When you went to the edge of the barge and looked in did you see Mr. Goett on the surface of the water?

A. Yes, sir.

Q. Was it immediately that Mr. McCormick went over the side into the water after him?

A. Yes, sir.

Q. And he got hold of him?

A. Yes, sir.

[fol. 157] Q. Isn't it true that when Mr. McCormick did get hold of Mr. Goett, Mr. Goett fought him?

A. Yes, sir.

Q. And broke his hold, I believe, isn't that true? That is, broke the hold that Mr. McCormick had upon him?

A. I couldn't say whether he broke his hold. I broke the hold when I jumped in.

Q. Do you recall when you testified before an investigator for the United States Coast Guard about this matter?

A. Yes, sir.

Q. In that investigation didn't you state that Mr. Goett broke Mr. McCormick's hold by fighting him in the water?

A. I don't remember, but I do know I told them he was fighting.

Q. And you saw them fighting in the water?

A. Yes, I saw them struggling.

Q. And you jumped?

A. That's how come me to jump in after them. He was fighting and holding to him and to look down it looked like they were both going under the water.

Q. You jumped into the water yourself?

A. Yes, sir.

Q. How long after you first noticed Mr. Goett in the [fol. 158] water was it that you jumped in?

A. I would say approximately three or four minutes.

Q. Was anyone else in the water besides Mr. McCormick and Mr. Goett at the time you went in?

A. No, sir.

Q. Did somebody go in subsequently?

A. Mr. Schultz went in after I did.

Q. Did you go in the water when Mr. Goett was still on the surface of the water?

A. Yes, sir.

Q. And what about Mr. Schultz? Was he still on the surface when Schultz went in?

A. The best I can remember he had just started to slip under the water. He had gone under the water when Homer jumped in to try to pick him up as he went down.

Q. Then there were three of you actually in the water besides Mr. Goett?

A. Besides Goett.

Q. Did Mr. Goett strike you?

A. Yes, sir.

Q. When you were in the water?

A. Yes, sir. When I broke his hold he threw his arms back like that, hit me across the mouth and knocked me back [fol. 159] towards the barge.

Q. Do you recall Mr. Fred Martin's arrival there on the barge at the place where Mr. Goett had gone overboard?

A. Yes, sir. I would say Mr. Martin come just after Homer went over the side, and he threw him a life ring, threw Homer a life ring, because we were on the side of the barge at the time.

Q. Mr. Martin threw a life ring such as you have described into the water?

A. Yes, sir.

Q. Do you know that that was the life ring from the digger boat?

A. I didn't know it at the time.

Q. Who is Mr. Martin?

A. Do you want me to show him to you?

Q. Just tell us who he is.

A. He is the superintendent of the company where I work, for Amherst Barge.

Q. Do you know where he was working at the time this happened?

A. No, sir. I think he was at the top of the hill. I don't have any idea where he was.

Q. But you say he arrived just after Mr. Schultz went [fol. 160] into the water?

A. Yes, sir.

Q. And threw the ring in the water with a line attached to it?

A. Yes, sir.

Q. Mr. Riggall, is it true that these men that were doing sandblasting, including Mr. Goett, wore a hood of some kind to protect them from the sand?

A. Yes, sir.

Q. Would you describe that for us?

A. It is a canvas hood with a square of glass in the front of it, comes down along over their shoulders, to protect the sand from bouncing back and cutting their skin.

Q. Was Mr. Goett wearing such a hood at the time of his accident?

A. I presume he was. I couldn't say he was because I didn't see him when he went over, but he was at the time I saw him in the middle of the barge.

Q. When you saw him in the water, though, he didn't have that hood on, did he?

A. No, sir.

Q. Did he have that hood on in the water?

A. No, sir.

[fol. 161] Q. Did he also work in a respirator?

A. They wear one, they use one under the hood, but he didn't have one on at the time.

Q. When you saw him in the water he didn't have the respirator on either?

A. No, sir.

Q. Were any of the men working on the CC-204 on this date wearing life jackets?

A. No, sir.

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[fol. 162] By Mr. Johnson:

Q. Let me ask you this, Mr. Riggall. Isn't it true that the Amherst Barge Company kept on hand in its supply house a large quantity of life jackets which were available to the men who worked on the barges if they wanted to use them?

Mr. Goldstein: Objection, sir.

[fol. 163] A. Yes, sir.

* * * * * * *

[fol. 167] By Mr. Johnson:

Q. Where were those life jackets kept, Mr. Riggall?

A. They were kept at the top of the hill in the supply house.

Q. Did you and the other employes who worked on these barges go into the supply house frequently?

A. Yes, sir, several times a day.

Q. And for what purpose did you go in there?

A. We are given tool checks and they also have their tool room in there, and we go in and check out tools.

Q. And you understood that the supplies and equipment in the supply room could be checked out to you on your check as an employe of the company?

A. Yes, sir. They put up notices to that effect, that we could check out as many as five—we have five checks.

Q. You understood, didn't you, if you wanted a life [fol. 168] jacket you could go there to the supply house and get one?

A. Well, I would say if I wanted one, but nobody ever said I needed one. I guess I could have checked one out any time if I had wanted to.

Q. You never tried?

A. I never tried.

Q. Mr. Riggall, are you yourself what you would call an expert swimmer?

A. No, sir.

Q. Are you a competent swimmer?

A. A competent?

Q. Yes. Do you consider yourself able to take care of yourself in the water?

A. Yes, sir, to a certain extent.

Q. Have you had any particular training or experience in swimming?

A. I have had a small amount of training in Scout work.

Q. Were the other men who went in the river, that is, Schultz and McCormick, apparently able swimmers?

A. They seemed to be. Just from that experience is all I could answer. They both seemed to be at the time.

Q. You said that none of you men were wearing life jackets at the time this happened?

[fol. 169] A. That's right.

Q. Isn't it true that you considered that doing the kind of work that you were doing on this barge that you would be just as well off working without a life jacket as you would be with one?

A. In my case, yes, sir, because where I was burning it would also burn. I mean it won't burn—it won't blow up, but it will burn.

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[fol. 171] By Mr. Johnson:

Q. Mr. Riggall, you say that this was the second day that you had worked on this barge?

A. The best I can remember it was the second day.

Q. And was it also the second day that Mr. Goett worked on the barge?

A. Yes, sir, I believe it was.

Q. He was there the day previous?

A. That's right.

Q. All day, if you recall?

A. Well, from the time—I don't remember whether we started work in the morning or the middle of the day. I don't recall it.

Q. You well knew the location of the barge and you knew what was on the barge and what was not on the barge for some time before Mr. Goett fell overboard, didn't you?

A. Yes, sir.

Q. You were entirely familiar, weren't you, with the barge and its design and its location?

A. Yes, sir.

Q. Mr. Riggall, have you ever done your work on barges with a life jacket on, I mean down to the present time?

[fol. 172] A. No, sir. You mean down to now?

Q. Down to now.

A. Yes, sir.

Q. State whether or not you found it to be awkward, uncomfortable and difficult to work with a life jacket on.

A. The work I do, welding, it is an impossibility to weld and keep the weld out of your eyes with a life jacket on. It is almost an impossibility because the jacket comes up, you couldn't get the hood down close enough to keep the light from going under it. If I wear one now I wear it loose so the hood will come under my chin.

Q. Isn't it a fact that a good part of the time you don't wear one at all?

A. No, sir, I sit on it most of the time or have it right where I can reach it.

Q. Doing the type of work you do, you have found it to be impossible to do your work with it on?

A. I would say it would take two life jackets a week if I wore one. It would burn them full of holes from the sparks from the weld.

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[fol. 173] Redirect examination.

By Mr. Pauley:

Q. Mr. Riggall, you say you have been wearing life jackets recently?

A. Yes, sir.

Q. When was the first time you were directed to wear a life jacket while you were in the employment of the Amherst Barge Company?

A. I couldn't recall the date.

Q. Can you give me approximately when it was?

A. It was after the time of the accident.

Q. When you say after the time of the accident you mean after the drowning of Mr. Goett?

A. Yes, sir.

Q. Mr. Riggall, prior to that time you were never directed to wear life jackets, were you?

A. No, sir.

Q. How often are you required to wear a life jacket now?

A. As long as I am on the river.

Q. Working on the boat?

A. Yes, sir.

Q. Mr. Johnson said something about Mr. Goett striking you and fighting while in the water. I believe you also [fol. 174] stated that you were a pretty fair swimmer. Is that correct?

A. I would say I can take care of myself in the water. I can get myself out if I fall in.

Q. I think you did Boy Scout work in swimming, did you not?

A. I have had a small amount of training in Scout work.

Q. Have you ever seen a man drown besides Mr. Goett—

Mr. Johnson: Your honor, I object.

Q. —in your swimming experience?

The Court: I suppose you are leading up to ask him whether this action of Mr. Goett in striking him was just the act of a drowning man.

Mr. Pauley: Yes, sir.

The Court: I don't think you need to prove that. I think we can take that for granted.

Mr. Goldstein: Excuse me, if your honor please. I think what we are trying to prove on that is not only the fact that Mr. Goett was in panic when he fell into the river, but the amount of pain and suffering that is involved, and as your honor will recall under the maritime

law the element of pain and suffering is involved as damages.

The Court: I don't see how you can expect to show the pain and suffering by the fact that a man drowning [fol. 175] hit another.

Mr. Goldstein: No, sir, but I do expect to show there is pain and suffering by panic. Panic is a sense of mental anguish and we will establish at a later time—

The Court: You don't need to go into a lot of proof that a drowning man has panic. We will just take notice of that.

* * * * * * *

By Mr. Pauley:

Q. I believe you said that Mr. Martin threw in the ring buoy that was on the digger boat after Schultz jumped in. Is that correct?

A. Yes, sir.

Q. When Schultz jumped in, if you recall, had Goett already gone down or not?

A. Yes, sir, as I told you before.

Q. So that the ring buoy wasn't thrown to Goett but to Schultz?

A. No, sir, it was thrown to Schultz.

Q. Now, I believe you testified that the digger boat and the barge were tied together. Is that correct?

A. Yes, sir.

Q. Isn't it a fact that the digger boat floats lower in the water than the barge?

A. Yes, sir.

[fol. 176] Q. So that the distance from the bow or top of the barge over the digger boat to the digger boat was how much, if you recall, what distance?

A. I would say between five and six feet.

Q. Tell me, Mr. Riggall, why didn't you run and get that ring buoy and line?

A. Did you ever see a man drowning?

Q. Yes, sir, I have.

A. Well, you don't think about it. All I thought about was getting over the side and getting the man. I never

thought about a ring buoy. I never thought at all about anything at the time like that.

Q. And I believe you said there were two men fighting together in the water.

A. Yes, sir.

Mr. Pauley: That's all.

Recross examination.

By Mr. Johnson:

Q. I take it from your last answer, Mr. Riggall, you felt when you saw Mr. Goett in the water that the thing that needed to be done immediately was for somebody to go in after him. Is that right?

A. That's right. When I come back to the side I figured [fol. 177] it was either I go in and try to save one of them or they were both going to drown in my opinion.

Q. You said since the time of Mr. Goett's drowning some of the men have worn life jackets while at work on the barges. Is that right?

A. Yes, sir.

Q. Isn't it true that all the men don't wear life jackets even now?

A. That's right.

Q. Some do and some don't?

A. Yes, sir. They have them. They are still available and they are still there for them. Once in a while there is a man that don't wear it.

Q. Some of the men wear them part of the time and they don't wear them part of the time. Is that right?

A. That's right.

The Court: Did you say that you are now directed by the company to wear them?

The Witness: Yes, sir.

The Court: Well, what other men doing what type of work are also directed by the company to wear the life jackets?

The Witness: Anyone that is going out on the barges to do work of any kind.

[fol. 178] The Court: All right.

The Witness: As long as they are going to be on the barges.

Mr. Goldstein: It your honor please, may I ask one question, please? You say you were directed after the accident to wear life preservers or life jackets. Were you ever directed before the accident to wear life jackets?

The Witness: No, sir. I told you no, sir.

The Court: That's been answered and he said no.

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Mr. Pauley: Mr. Harold McCormick.

HAROLD L. MCCORMICK called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and speak loud.

The Witness: Harold L. McCormick.

The Court: Let me suggest now that probably a good deal of the evidence of this man is cumulative, and such part of this evidence as is merely cumulative and is not going to be contradicted does not need to be rehashed. [fol. 179] Are they any facts that Mr. Riggall testified about that are going to be contradicted by defendants, and if so what are they?

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Mr. O'Farrell: Counsel for defendant Amherst does not intend to contradict anything that Mr. Riggall said. • • •

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[fol. 180] Mr. Love: I don't know that we will have any contradiction of anything that was said there.

• • • • • • •

Direct examination.

By Mr. Pauley:

Q. Will you state your name, please?
A. Harold L. McCormick.
Q. Where do you live, Mr. McCormick?
A. 13 Tinkersville Drive.
Q. Is that in the Town of Port Amherst?

[fol. 181] A. Yes, sir.

Q. What is your age?

A. Twenty-seven.

Q. By whom are you employed?

A. Amherst Barge Company.

Q. How long have you been employed there?

A. About twenty-two months.

Q. You were employed there on the 5th of October, 1955, when Mr. Goett met his death by drowning, were you not?

A. Yes, sir.

Q. Where was Mr. Goett when you noticed him, first noticed him before he went overboard?

A. When I turned the machine on he was about a quarter way down on the barge and about the center of the barge.

The Court: Will you mark that out, please, on that diagram?

Mr. Pauley: I have a picture here he can mark it on, your honor.

Q. This diagram here, I will explain it to you. This is the shore line here. This is the digger boat and this is the large rectangular area of the barge. Will you mark in chalk there on the barge where you last saw Mr. Goett?

A. Approximately the same place as Mr. Riggall. (Indi-
[fol. 182] cating on blackboard.)

Q. About a quarter way on the barge?

A. A quarter way on the barge, yes, sir.

Q. And you recognize that to be the barge, do you? (Handing photograph to the witness.) Does that look like the barge?

A. It is similar.

Q. Will you mark an X on the barge here?

A. He was near this end, approximately right here.

Q. About—

Mr. Love: May I inquire what the last question was? We couldn't hear it.

Mr. Pauley: I asked him to mark in pen on the barge where he last saw Mr. Goett, the general position, and he made an X about a quarter of the way back on the barge at the second cleat.

Q. The digger boat, where was it located with reference to the X you have placed on that picture?

A. It was on this end of the barge.

Mr. Love: Indicating the opposite end.

Q. The opposite end of the barge. Is that correct?

A. Yes, sir.

Mr. Pauley: All right.

[fol. 183] Mr. Johnson: And by that you mean opposite the place that you had marked the X?

The Witness: Yes, sir.

By Mr. Pauley:

Q. Now, what was he doing at the time you saw him?

A. I just turned the machine on and he was starting to sandblast.

Q. You turned the sandblasting machine on?

A. Yes, sir.

Q. Then what did you observe, if anything?

A. I turned my back so I wouldn't get hit with the sand and walked down the barge so I wouldn't get hit in the face with it.

Q. Then what did you observe, if anything, after that with reference to Mr. Goett?

A. Well, I looked backward. They were just starting to sandblast. I turned my back on them because the sand flies and later I heard the nozzle hitting the bulkhead and I looked around and didn't see him and knew he was in the river.

Q. What did you do after that?

A. Went in after him.

* * * * * * *

[fol. 184] By Mr. Pauley:

Q. Now, Mr. McCormick, did you know where any lifesaving equipment was located on or close to that boat?

A. No, sir.

Q. Had the company ever given you any lifesaving drills while you were working on that boat?

A. No, sir.

Q. Or any other barge you worked on there?

A. No, sir.

Mr. Love: When you say company you mean the Amherst Barge Company?

Mr. Pauley: The Amherst Barge Company, yes, sir.

* * * * * * *

[fol. 185] Q. Did you know of the presence of any life jackets there available for you, we will say, as a worker?

A. I knew there were life jackets in the supply house, yes, sir.

Q. Had anyone given you any instruction with reference to the use of those jackets?

A. No, sir.

Q. What was your understanding about those jackets with reference to who was to use them?

A. As far as I knew they were for everybody, but mostly they came off of the boats.

Q. When you say boats do you mean the barges or the movable boats?

A. Towboats.

* * * * * * *

[fol. 186] Robert A. Goodwin called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and please speak up loud.

The Witness: Robert A. Goodwin.

Direct examination.

By Mr. Pauley:

Q. Will you state your name, please?

A. Robert A. Goodwin.

Q. Mr. Goodwin, where do you work?

A. Amherst Barge Company.

Q. How long have you worked there?

A. Nine months one time and three months another time.

Q. What is your occupation?

A. Painter, spray painter.

Q. You were aboard the Carbide barge, weren't you, when Mr. Goett drowned?

A. Yes, sir.

Q. Where did you last see Mr. Goett on that barge before he went overboard?

A. When I looked up at him he was near the edge of the barge on the inside of the kevel.

[fol. 187] Q. All right. Will you mark it on this chart here, this drawing? This is the barge here, facing up the river. Here is the digger boat. This is next to shore, next to the river.

Mr. Love: How about taking us in on the conversation? We would like to hear it.

Q. You see this small rectangular area here? That is the digger boat. You remember that boat, don't you?

A. Yes, sir.

Q. Now, in front of it or facing up the river according to this diagram is a long rectangular area. I traced it here with chalk. That is the barge. The line right beside the rectangular area is the shore line. This area over here to your left represents the river. Where did you see Mr. Goett?

A. Outside.

Q. When you say outside, next to the river side? Is that right?

A. River side, yes, sir.

Q. About how far was he from the edge of the barge?

A. I don't know what to figure the kevels, the distance they are in.

Q. When you speak of kevel, I will show you this picture here and ask you to point out a kevel to me.

A. All these here.

[fol. 188] Q. I will ask you to mark a circle around a kevel.

The Court: Wait a minute. You get so many markings on there. Let him put a circle where he saw Goett. Then you will kill two birds with one stone.

Mr. Pauley: All right, sir.

Mr. O'Farrell: Your honor, I might interject, you have one circle where the last man saw him. Wouldn't it be better to have this man put his initials?

Mr. Pauley: It was an X the last time.

Q. The digger b[illegible]t is on this end of the barge here opposite the X here and--

A. This blaster set over here and this straight across would run—that would be about middle ways where I saw him. It looked like this was blasted out around here, had been, and he was coming back.

Q. Just put your mark where you last saw him.

A. Well—

The Court: Mark a circle.

Q. Make a circle.

A. Around here. (Indicating on photograph.)

Q. What was he doing at the time you saw him?

A. Well, at the time when I looked up at him I was blowing sand back towards the lower—down the river space, [fol. 189] blowing it off of the surface for painting, and when I looked up at him he was sandblasting and it seemed like it was—oh, it might be a minute or minute and a half before I looked up again. Then when I looked up again I missed him.

Q. And he was overboard, was he?

A. Yes.

Q. What was your occupation with Amherst Fuel Company?

A. Painter, spray painter.

Q. Had you worked on any barges previous to that time?

A. Yes, we had been painting numbers on it was about the only thing, no major job.

Q. Did you have any knowledge of the presence of any life jackets available for your use?

A. Not at the time I didn't because I just never used them and wasn't required then.

Q. Do they require you to use them now?

A. Yes, sir.

Q. At the time of Mr. Goett's drowning was there a stanchion line around that barge?

A. At the time?

Q. Yes.

A. No, sir.

Q. Was there ever one put around the barge afterwards? [fol. 190] A. Yes, after it was taken out of the water, there was.

The Court: What is a stanchion line?

The Witness: It is a rope put around to keep you from falling over, goes around the end and the sides.

The Court: Is this stanchion line above the floor surface of the barge or is it below?

The Witness: It is above. I believe it is something like three feet, four feet.

The Court: It just answers the same purpose that a railing would, does it?

The Witness: Yes, sir.

The Court: All right.

By Mr. Pauley:

Q. How long after Mr. Goett's death was it that the stanchion line was put around the barge, if you remember?

A. I don't recall whether it was the same day or the day after that.

Q. What attempt, if any, did you make to rescue Mr. Goett?

A. Well, the only thing I could find on the barge—

Q. Can you talk a little louder, please?

A. The only thing I could find on the barge at the time he was overboard was the sandblasting hose and a half inch hose which I was using myself to blow the sand back [fol. 191] with, and I throwed my hose over and it wouldn't reach and I think the sandblasting hose was on. We got it cut off.

Q. Would the sandblasting line reach?

A. No.

Cross examination.

By Mr. Johnson:

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Q. You have marked on this picture, which is identified as the Plaintiff's Exhibit Number 1 a circle which shows [fol. 192] where you last saw Mr. Goett at work.

A. Yes, sir.

Q. And that was, I believe you said, approximately one minute before you looked up and noticed that he was overboard.

A. Yes, sir.

Q. At the time you saw him where you have marked the circle on the barge he was facing inboard towards the center of the barge with his back to the river, wasn't he?

A. Uh huh, yes.

Q. And he was at that time working or moving slowly backwards with the hose of the sandblaster in his hand?

A. Yes, sir.

• • • • • • •

By Mr. Johnson:

Q. Mr. Goodwin, did I understand you to say that you did not know on the day that Mr. Goett was drowned that there were life jackets available to you and to him and [fol. 193] to other employes in the supply house if you wanted one?

Mr. Goldstein: Objection, if your honor please. If Mr. Johnson wants to ask whether or not Mr. Goodwin knew as to himself, that's perfectly all right, but I certainly don't think he can ask whether it was known to Mr. Goett or anybody else.

The Court: I don't think he has asked that.

Mr. Goldstein: I am sorry, then. I misunderstood the question.

The Court: He said available to this man or the others.

Q. Is that your testimony?

A. Well, ask it again.

Mr. Johnson: Would you read the question, please?

(The pending question was read.)

A. I don't think I did, no.

Q. Do you recall when the Coast Guard officer investigated this case that you were asked this question, "To your knowledge can life jackets be checked out of the storeroom and to your knowledge has anyone ever been refused a life jacket that applied for one?"

Mr. Pauley: Excuse me, Mr. Johnson. What page?

Mr. Johnson: Page 20 and 21, Coast Guard Report.

Mr. Pauley: What was your first statement to him, [fol. 194] please?

Mr. Johnson: Read the question as far as I got with it.

(The pending question was read.)

Q. And didn't you answer that question as follows, "As I say, I think they are available and I never heard of anyone being refused one."

A. Yes, I think I did answer that that way, but he was asking questions so fast that I think that I kind of overlooked it, but the thing—what brought to my mind when I answered it was if they was doing that type of work they was doing, I thought they should have it. I really didn't know that they didn't have them then. In fact, I wasn't around the supply room back then to know a whole lot to start in on a place to work.

Q. I am not sure I understand your answer, Mr. Goodwin, but it is a fact that you did make that statement in answer to that question before the Coast Guard investigator?

A. Yes, it is.

. . . . . .

[fol. 195] Mr. Pauley: I recognize that fact, but I think—

The Court: He has made his explanation, I believe.

Mr. Pauley: Did you know at any time that life preservers were available before you got on that boat with Mr. Goett?

The Witness: That's before the drowning?

Mr. Pauley: Yes, sir.

The Witness: No, I didn't know.

Mr. Pauley: I have one more question, if your honor please.

Did you have any knowledge of a ring buoy being on the digger boat?

The Witness: No, sir.

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[fol. 196] THOMAS L. HAMMONS called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and please speak up.

The Witness: Thomas L. Hammons.

Direct examination.

By Mr. Pauley:

Q. Where do you live, Mr. Hammons?

A. Rand, West Virginia.

Q. By whom are you employed?

A. Amherst Barge Company.

Q. Were you employed by Amherst Barge Company on October the 5th, 1955?

A. Yes, sir.

Q. You recall Mr. Goett was drowned there on that day, do you not?

A. Yes, sir.

Q. When did you see Mr. Goett just before he was drowned? Where was he?

A. You mean while he was on the sandblasting?

[fol. 197] Q. Yes, sir.

A. Well, he was about seven foot from the kevel.

Q. The kevel on which end of the barge?

A. It was on the upper end of the barge.

Q. And when you say the upper end of the barge you mean the end opposite the digger boat. Is that correct?

A. Yes, sir.

Q. And that was about how many feet from the front end of the barge?

A. I couldn't say right off. It was about a quarter way back from the head end of the barge.

Q. And how close was he to the river side of the barge, the side that was bordering on the river?

A. Well, he was about eight foot from the river side when I last saw him.

Q. When did you next see him?

A. I didn't see him till he was in the water when he was going down.

Q. Were you familiar with any lifesaving equipment that was located on that boat or elsewhere?

A. No, sir.

Q. Had you been told about the existence of any ring buoy or line or life preservers?

[fol. 198] A. No, sir.

Q. What about life jackets. Did you know about the existence of life jackets?

A. Well, I didn't know of any. They could have had them in the supply house, but I didn't know of any.

Q. You were never told about them, were you?

A. No, sir.

Q. Was there a stanchion line around that barge or line around the edge of that barge?

A. No, sir.

Q. Was there ever one placed around there to your knowledge?

A. Yes, sir.

Q. When was that?

A. After the barge was pulled on the ways.

Q. And that was after the death of Mr. Goett?

A. Yes, sir.

Q. When were you first directed to use your life jackets while you were working on the boats up there?

A. Well, sir, I don't work on the river all the time. I don't remember when it was.

Q. Have you ever been directed to use life jackets since the death of Mr. Goett?

[fol. 199] A. Yes, sir.

Q. When was that?

The Court: He said he didn't remember.

Q. Sir?
A. I don't remember.

The Court: He says he didn't remember.

Q. Was that after or before the death of Mr. Goett?
A. After.

* * * * * * * *

[fol. 200] Homer A. Schultz called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and speak loud.
The Witness: Homer A. Schultz.

[fol. 201] Direct examination.

By Mr. Pauley:

Q. Mr. Schultz, what is your age?
A. What is my rate?
Q. Your age.
A. Thirty-nine.
Q. Where are you employed now?
A. Goodrich Gulf Chemicals.
Q. What is your occupation?
A. Welder.
Q. Were you employed by the Amherst Fuel Company on October 5th, 1955?
A. Yes, sir.
Q. Do you recall the drowning of Marvin Goett?
A. Yes, sir.
Q. Were you on the barge at the time that he fell in the river?
A. Yes, sir.
Q. Were you given any instructions or did you know of any safety equipment available on that barge at the time he drowned?
A. No.
Q. Were you ever given any instructions relative to any [fol. 202] safety equipment?
A. No.

Q. Did you know or were you ever instructed concerning any life preservers?

A. No.

Q. Did you know about a life ring on the digger boat located there?

A. Yes.

Q. Did you attempt any rescue of Mr. Goett on your own part?

A. Yes, I jumped in and tried to rescue him. I didn't succeed.

Q. You didn't obtain the equipment, then, from the digger boat, did you, the life ring?

A. No, sir.

Q. Can you explain why you didn't do that, Mr. Schultz?

A. Well, a life ring wouldn't have done me any good. I wasn't sure I saw Mr. Goett. He had done gone under and I wasn't even sure that I saw him, but Riggall and McCormick pointed to where he went down and I tried to get him out of the water after he sank, so a life ring wouldn't have helped me any in rescue operations.

Q. Then you weren't a part of the rescue at all, were you? [fol. 203] You were diving after him after he had gone down.

A. Well, I thought that I could see the body under the water, but I couldn't be sure.

Q. Did you have any instructions at all concerning any life jackets that were available to you to work?

A. No.

Q. Were they made available for you after the drowning of Mr. Goett?

A. Yes.

Q. Do you have any knowledge of whether or not there was a stanchion line placed around that barge while it was in the water on the date of his death?

A. While it was in the water?

Q. Yes, sir.

A. No.

Q. Was there a stanchion line later placed around it after his death?

A. Yes.

Q. How long was Mr. Goett in the water before you recovered the body, to the best of your knowledge?

A. Well, an estimate would be twenty, twenty-five minutes; I don't know.

Q. And how long, if you know, was he in the water before [fol. 204] he went under?

A. I don't know.

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COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Goldstein: If your honor please, at this time I would like to read certain answers to interrogatories both by Union Carbide and Carbon Corporation and by Amherst Barge Company. There seem to be some discrepancies in the answers given to us by both companies and I should like to place that before your honor for your honor's surveillance.

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[fol. 205]

MOTION TO EXCLUDE THE ANSWER OF AMHERST ETC. AND OVERRULING THEREOF

Mr. Love: Before that's done, if your honor please, I would like to move the court to exclude so much of the answer made by Amherst to the question number twelve that is not responsive to the question.

Specifically Amherst was asked, "State the date and time of day that the CC-204 was inspected by the Amherst Barge Company and the name and capacity of the party who inspected the vessel."

The answer goes further than the question in that it brings in an independent inspector and also refers to one of the employes of Carbide and Carbon, which is not responsive to the question. That is one of the discrepancies he is talking about.

Mr. Goldstein: It sure is.

Mr. Johnson: Mr. Love's point may be well taken. We have no objection to any part of our answer to that ques- [fol. 206] tion going out if it is deemed not responsive to

the question, I think we amplified our answer more than that.

Mr. Goldstein: At this time, if your honor please, I do have objection to any part of that answer going out. We have given them a question. They gave us an answer, and whether or not it is responsive should certainly be up to us, the answer to our question, as to whether or not we want to have it stricken.

The Court: I will overrule the motion to strike the answer and hear Mr. Goldstein as to what the questions and answers are, if those questions and answers are material to my decision on any of the issues.

Mr. Goldstein: I think I can make it simple, sir. Very plainly speaking, all I did was ask each of the companies who their men were aboard the barge and when their men were aboard the barge for the first time after the barge was turned over by Union Carbide to Amherst.

In the Union Carbide answers to interrogatories, which we received first since they were served first, their answer to that question is that, "Fred C. Pritchard, . . . Maintenance Engineer for Barges. Duties, Supervisor of Barge Maintenance under Works Engineering Department, and in conjunction with Traffic Department of defendant. During the period of repair at Amherst Mr. Pritchard was not at [fol. 207] Amherst Docks until after death of Mr. Goett. On October 7, 1955, Mr. Pritchard inspected the vessel on marine ways and ordered additional minor repairs, not related to the sandblasting" operation.

In the answer served upon the plaintiff by Amherst, and in answer to the question that was presented to your honor by Mr. Johnson, they stated "On October 2d, at 10:30 a.m., Rex Buckley, an independent inspector, made a gas examination of the barge and rendered a gas free certificate, for which services he was paid by Amherst. On October 3rd, Frederick P. Martin, Amherst's superintendent of maintenance, went on board the barge in company with Mr. Fred Pritchard of Carbide, and examined the barge and discussed the work to be done on the barge."

In other words, Union Carbide said that their man did not go on the vessel until the 7th, two days after Mr. Goett's death. Amherst said Carbide's man went with their man

two days before. We would like to have that matter clarified, sir.

The Court: All right.

* * * * * * *

[fol. 210] Frederick C. Pritchard called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and speak loud.

The Witness: Frederick C. Pritchard.

Direct examination.

By Mr. Goldstein:

Q. Mr. Pritchard, you have the title of Maintenance Engineer for Barges, Supervisor of Barge Maintenance under Works Engineering Department?

A. Yes.

Q. And you are employed by Union Carbide. Is that right?

A. That's right.

[fol. 211] Q. How long have you been employed by them?

A. Since September of 1946, not in that capacity.

Q. When were you employed for the first time in that particular capacity?

A. I believe sometime in 1949.

Q. And you have done that work constantly for them since that time?

A. Yes.

Q. And exactly what does that work entail? Can you tell us that?

A. At times when barges are dry-docked or pulled out of the water I usually make inspections and specify repair work to be done and then we follow—after the work has been completed I also make inspections to see that that work has been done as specified.

Q. And that's for the purpose of making certain that contract agreements have been lived up to. Is that right?

A. Yes. I also make those inspections at times damages have been reported or defects reported.

Q. At any time in October of 1955 were you aboard the CC-204?

A. Yes.

Q. And that is the barge owned and operated by Union [fol. 212] Carbide. Is that right?

A. Yes.

Q. When you went aboard that vessel for the first time was there any lifesaving equipment aboard her?

A. I don't recall any. I don't believe there was.

Q. Was there any lifeline around the vessel at that time?

A. During the day that I was there—I am not sure whether—

Mr. Love: These questions go to a certain day?

Mr. Goldstein: Not yet. I simply asked him the first time.

Mr. Love: You asked him the first time he went aboard her?

Mr. Goldstein: That's right, in October 1955.

Mr. Love: The first time he went aboard in October 1955?

Mr. Goldstein: That's right.

A. The day that I recall being aboard the vessel in October '55, there was a stanchion line—I don't recall whether that was in the process of being applied to the barge or whether it was actually in place, but there was one there by the time I left the barge.

Q. And where was the barge at that time?

[fol. 213] A. It was on the marine ways at Amherst Barge Company.

Q. And that is the very first time you were on that barge in October of 1955?

A. To the best of my memory, that's correct.

Q. That date was what?

A. October 7.

Q. Pursuant to the instructions or within your knowledge were any other employes, either of a supervisory capacity or workmen or employes, aboard the CC-204 during October of 1955 before you?

. . . . . .

A. Well, Mr. Buckley, who issued the gas free certificate,

is an employe of Union Carbide, but he was not acting in that capacity at that time. He is the only person I recall.

Q. He was on the 2d of October. Is that right?

A. I am not sure what date he was there.

Q. But in any event he was on before the death of Marvin Goett. Are you sure of that?

A. No, I am not sure. No.

Q. What position does Mr. Buckley have with the Union Carbide?

[fol. 214] A. Well, he works with our equipment safety division. I am not sure—he is an engineer in the equipment safety division of Carbide.

Q. Safety division, did you say?

A. Yes, sir.

Q. Is lifesaving equipment part of the safety division?

A. I don't believe—I believe they have a separate safety division that handles that sort of equipment at Carbide.

Q. That isn't my question. My question is does his job as part of the safety equipment division include the lifesaving equipment aboard the vessel?

A. No.

Q. If you know, is he familiar with lifesaving equipment aboard the vessel as a member of that division?

A. No, I don't believe so. I don't know.

Q. You don't know? He could be?

A. It is possible.

Q. Do you know how long he was aboard that vessel on October 2d?

A. No, I don't.

Q. Do you know the purpose for which he went aboard the vessel?

A. I think he went aboard to issue a gas free certificate [fol. 215] which was required by the Coast Guard prior to doing any repair work that involves flame or any possibility of igniting any flammable mixtures which might be contained in the vessel.

Q. Are you familiar with that procedure?

A. No, I am not.

Mr. Goldstein: That's all.

Cross examination.

By Mr. Love:

Q. Mr. Pritchard, in making the inspection about which you have just testified, did Mr. Rex Buckley act as an employe of Carbide or as a certificated inspector for the Coast Guard?

A. As a certificated inspector for the Coast Guard.

Q. And he makes such inspections for all companies on the river that require his services and who pay him therefor?

A. Yes.

Mr. Love: Thank you.

Redirect examination.

By Mr. Goldstein:

Q. But he was an employe of Union Carbide at that time. Is that right?

A. Yes.

Cross examination.

Mr. Love: If I may finish—

Mr. Goldstein: I am sorry. I didn't realize you weren't [fol. 216] finished.

Mr. Love: Was Mr. Rex Buckley an employe of Carbide when he made that inspection at that time? Who was he working for?

The Witness: At that time he was working for himself.

Mr. Love: But he is an employe of Union Carbide?

The Witness: That's correct.

Mr. Love: That's all.

The Court: I think I would like to find out whether Mr. Pritchard is just stating his conclusions about these matters or stating facts. Was he on a salary at that time?

The Witness: Well, you mean in connection with this work?

The Court: Was he on a salary at Carbide?

The Witness: Yes, I think so, but not in connection with this particular work.

The Court: Was there any hiatus in the payment of his salary?

The Witness: I am not sure I understand.

The Court: I mean did you deduct something from his salary for some other work that he did other than for Carbide?

The Witness: No, I don't think so.

The Court: Well, did he charge a fee in addition to [fol. 217] his salary and collect that fee from the other parties?

The Witness: Yes, he did that.

The Court: That was permitted by the employer?

The Witness: That's correct.

The Court: All right.

Redirect examination (continued).

By Mr. Goldstein:

Q. Am I then correct in saying that this freedom of time to do work for other people was part of his contract with Union Carbide?

A. I am not sure whether it was part of his contract, but that is practiced.

Q. That was his practice?

A. Yes.

Q. And that was permitted to him by Union Carbide. Is that correct?

A. I am not sure about that. I think possibly, but I don't know the circumstances of that agreement.

* * * * * * *

[fol. 219] Frederick P. Martin called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and speak loud.

The Witness: Frederick P. Martin.

Direct examination.

By Mr. Goldstein:

Q. Mr. Martin, you are employed as superintendent of maintenance for Amherst Barge?

A. That is correct.

Q. And how long have you been so employed?

A. A total for the two companies approximately twenty-three years.

Q. When you say the two companies, you mean—

A. Hatfield Campbell's Creek Coal Company and Am-[fol. 220] herst Barge Company.

Q. Amherst Barge is the successor in interest?

A. That's right.

Q. How long have you worked for them in the capacity of superintendent of maintenance?

A. Approximately six—at the time of this accident?

Q. No, right now.

A. Going on seven years, between six and a half and seven.

Q. What are your duties as superintendent of maintenance?

A. That takes in quite a territory. In other words, supervisory and designing and general mechanics.

Q. Well, do you go aboard the vessel to inspect the vessel?

A. Everywhere, yes.

Q. And in the course of that inspection you would inspect the quantity of lifesaving equipment that might be aboard the vessel?

A. Not necessarily. It would be general work that had to be done on the vessels there, on the different particular jobs that we have to do.

Q. Let me ask you this. If you felt that lifesaving equipment should be used aboard the vessel, do you have the [fol. 221] capacity to order lifesaving equipment put aboard her?

A. At all times.

Q. When was the first time you went aboard barge CC-204 in October of 1955?

A. That was—in other words, the barge was delivered on Saturday. I didn't board it until Monday.

Q. Saturday was the 1st of October?

A. No, that was the 2d, I believe. No, it was the 1st. The 2d, I believe, was Sunday, if I am not mistaken. Just a minute and I will give you that date.

Q. In any event you went aboard—

A. It was on the 2d. I went on the 3d.

Q. You went on the 3d and that is before the death of Marvin Goett?

A. That's right. That was on Monday.

Q. Who went aboard the vessel with you?

A. I went in the presence with Mister—in other words I went on it first, lining out the work. In other words, we were preparing to get ready for the work. Mr. Pritchard always comes up and we go over the barge to line out the necessary work to do to it.

Q. And was Mr. Pritchard with you on October 3d?

A. Yes, sir.

[fol. 222] Q. And that is the man who not more than ten minutes ago stated that he was not aboard the vessel until the 7th?

A. That's correct.

Q. It is quite obvious that one of you is mistaken.

A. I have no proof to back it up other than my statement. That's right.

Q. When you were aboard the barge on the 3d did you inspect her?

A. As to the work to be done, yes, sir.

Q. And did you notice that there was a lack of any lifesaving equipment aboard the vessel?

A. That I hadn't taken into consideration.

Q. You didn't take it into consideration?

A. No, sir.

Q. But that is within your scope of duty?

A. Well, we did have the life ring close there, yes.

Q. When you say close, where was it?

A. That was on the digger boat.

Q. And you looked around and saw there was none on the barge?

A. That I didn't check. In other words, I knew there wasn't on the barge, but I didn't check the lifesaving equipment.

The Court: I think you were asked whether it was with-[fol. 223] in the scope of your duties to determine whether there was sufficient lifesaving equipment on the barge. Did you answer that?

The Witness: I would say partially, yes.

Q. And it would be up to you as well as anybody within your line of rank in the company to order lifesaving equipment aboard the barge?

A. That's right.

Q. We are not now talking about lifesaving equipment to be given to the men to wear. We are simply talking about lifesaving equipment to be stationed aboard the barge, and that would be within your scope of duty?

A. A barge usually never carries lifesaving equipment.

Mr. Goldstein: If your honor please, I move to strike that answer as unresponsive.

The Court: I will sustain the motion. You are asked whether it was within the scope of your duty to determine whether or not lifesaving equipment was needed and, if so, to furnish it.

The Witness: That's right, yes.

Q. And you saw the barge without any lifesaving equipment at that time. Is that so?

A. Yes.

* * * * * * *

[fol. 225] Cross examination.

By Mr. Love:

Q. Mr. Martin, do you know at whose request Mr. Rex Buckley made the gas inspection of this barge?

A. I didn't understand you, sir.

Mr. Love: Would you read it to him?

(The pending question was read.)

A. That was through the Amherst Barge Company through Mr. Barickman, who made contact by phone for the gas free certificate.

[fol. 226] Q. And do you know who paid for that?
A. The Amherst Barge Company.
Q. And do you know what day that inspection was made?
A. That was made on Sunday, October the 2d, 1955.

* * * * * * * *

[fol. 227] ELLEN GOETT the plaintiff, called as a witness in her own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and speak loud.
The Witness: Ellen Goett.

* * * * * * *

[fol. 241] Cross examination.

By Mr. O'Farrell:

Q. Mrs. Goett, has anyone ever advised you that you were entitled to receive money on behalf of yourself and your daughter for benefits in the nature of compensation?

Mr. Goldstein: If your honor please, I object to any line of questioning concerning Longshoremen's and Harbor Workers' compensation. That is not in this case. We are not suing Amherst Barge and that is certainly not a valid defense as against the plaintiff in this case.
[fol. 242] The Court: In view of the questions about support, I overrule your objection.

A. You mean have I ever been contacted regarding compensation?
Q. Yes.
A. I received some forms through the mail to fill out.
Q. And did you ever fill them out?
A. Yes, sir.
Q. Did you ever attempt to get Longshoremen's and Harbor Workers' Compensation benefits?

Mr. Goldstein: If your honor please, I object to that question. Mrs. Goett is under the advice of counsel and counsel has advised her not to take that claim up at this time. We have filed an election to sue a third-party and the claim for compensation is being stayed. As such, I feel that it would serve no other purpose—

The Court: She could answer this question, I take it, if permitted and I do permit it. Overrule objection.

Mr. Goldstein: Thank you, sir.

The Witness: What is the question?

Mr. O'Farrell: Read the question back, please.

(The pending question was read.)

A. The papers that I recall receiving were West Vir-
[fol. 243] ginia compensation papers, as best I recall, and I filled them out and they are on file with Mr. Pauley.

Mr. Goldstein: If your honor please, I move at this time to strike that entire question because the answer in this particular case obviously shows that West Virginia compensation laws are not applicable to this case.

Mr. Love: There is no such thing in this record, if your honor please. I object to that statement.

The Court: I will overrule objection.

Mr. Goldstein: Thank you, sir.

By Mr. O'Farrell:

Q. Now, Mrs. Goett, I ask you again has anyone ever advised you when your husband died that you and your daughter were entitled to workmen's compensation benefits under the Longshoremen's and Harbor Workers' Act?

A. No, sir.

Q. And that you could be drawing them right now without prejudice to this lawsuit?

A. No, sir, I didn't know there was such a thing.

Q. Nobody has told you that. Is that right?

A. I don't know what you are talking about.

Mr. Goldstein: I am sorry to interrupt. May I have that last question? Will you wait a moment, please, Mrs. Goett? Can you read that last question of Mr. O'Farrell?

[fol. 244] (The last three questions and answers were read.)

Mr. Goldstein: If your honor please, that is an incorrect statement of law and I ask your honor to disregard that. I think your honor well knows that the minute that Mrs.

Goett accepts that compensation award she is forever barred from proceeding in this lawsuit.

Mr. O'Farrell: Your honor, that isn't the law at all. I don't purport to be an admiralty lawyer, but I know that isn't the law.

The Court: The question, while it may have purported to state the law, was not framed in any such form. He just asked whether that information had been given to her by anybody and she said it had not.

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[fol. 251]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
at Charleston

No. 1755

[Title omitted]

Transcript of Proceedings—May 14, 1957

Tried before Honorable Ben Moore, United States District Judge, on the 14th day of May, 1957.

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[fol. 265] HAROLD McCORMICK recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct examination.

• • • • • • • •

[fol. 268] By Mr. Pauley:

Q. Can you estimate at this time how long Mr. Goett was in the water in the state that you found him when you [fol. 269] jumped in after him?

A. You mean before he went under?

Q. Yes, before he went under.

A. I would say between ten and fifteen and twenty minutes.

• • • • • • • •

[fol. 270] Cross examination.

By Mr. Johnson:

Q. Mr. McCormick, do I understand that you now say from the time you went into the water until Mr. Goett went under the water, that there was a period of ten to fifteen or twenty minutes?

A. That's an estimate, yes, sir.

[fol. 271] Q. How long was Mr. Goett under the water before his body was brought to the surface?

A. That I don't know, sir.

Q. Do you have any estimate?

A. Maybe fifteen minutes.

Q. You were there during all that time?

A. Yes, sir.

Q. Do you recall that when you testified before the Coast Guard investigator with respect to this matter you were asked this question: "How long was Goett in the water from the time he fell and the body was recovered?" and your answer was, "I can't say. I don't know what time he fell in but I think it was not more than eleven or thirteen minutes in the water."

A. That's what I was told.

Q. Wasn't that the answer that you made?

A. Yes, sir.

Q. Now you say that he was ten, fifteen or twenty minutes on the surface of the water and that he was approximately fifteen minutes underneath the water before he was retrieved?

A. Yes, sir.

Q. Is that what you now say?

A. Yes, sir.

[fol. 272] Q. Where was he when you first discovered him in the water?

A. He was about five foot out from the barge, sir.

Q. And what was he doing?

A. Fighting to keep hisself on top.

Q. Did you jump in immediately?

A. Yes, sir.

Q. How long was it before you got hold of him?

A. Almost immediately, sir.

Q. Then what happened?

A. I swam with him to the edge of the barge.

Q. How long did that take?

A. I couldn't say, sir.

Q. Did it take very long?

A. It seemed like a long time, yes, sir.

Q. How long did you have hold of him?

A. I couldn't say that either, sir.

Q. You have no idea?

A. No, sir.

Q. Was he fighting and struggling with you all the time you were in the water?

A. Yes, sir.

Q. And that went on for ten, fifteen or twenty minutes?

[fol. 273] A. Yes, sir.

Q. How long was it before Mr. Riggall came in the water?

A. As soon as I dropped loose from the wearing strip and both of us started under.

Q. How long was that after you first went in?

A. I couldn't say. Truthfully.

Q. Do you have any estimate?

A. I would say ten minutes.

Q. Ten minutes after you went in before Mr. Riggall came in?

A. Yes, sir.

Q. And Mr. Goett was still on the surface of the water at that time?

A. Yes, sir.

Q. Still fighting and struggling?

A. Yes, sir.

Q. How long did he continue to fight and struggle after Mr. Riggall went in the water?

A. I would estimate maybe five minutes.

Q. And you and Mr. Riggall were both trying to rescue him during that time?

A. Yes, sir.

Q. When did Mr. Schultz go in the water?

[fol. 274] A. Just as Mr. Goett went under.

Q. How long would you say that was after you first went in the water?

A. I would say about fifteen minutes.

Q. During this ten, fifteen or twenty minutes how much of the time were you hanging onto the wearing strip on the side of the barge?

A. That I couldn't say.

Q. Do you have any estimate?

A. Three.

Q. Three minutes?

A. Yes, sir.

Q. And the rest of the time you were actually in the water struggling with Mr. Goett?

A. Yes, sir.

• • • • • • •

[fol. 278] FREDERICK MARTIN recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct examination.

By Mr. Goldstein:

Q. Mr. Martin, you testified yesterday, I believe, you were in the capacity as a supervisor since 1946 or '47? Was that your testimony, as you recall?

A. No, sir, I said in '50.

Q. In '50?

A. With this company, yes, sir.

Q. In any event, you were with this company since '50 in a supervisory capacity?

[fol. 279] A. Yes, sir.

Q. And, of course, you were with them on or about October 5th—

A. Yes, sir.

Q. —1955. Now, are you familiar with the entire area of Reed, West Virginia, where the Amherst docks are located?

A. That's at Reed.

Q. Reed?

A. That's right.

Q. And you are familiar with the physical contour of the land and you are familiar with the bridge that is there and the bridge pilings?

A. That's right.

Q. And the section of the ways and everything else?

A. Yes, sir.

Q. And you are there every day practically?

A. Every day.

Q. In fact, that is your working area. Is that so?

A. That's right.

Q. When was the bridge built?

A. That bridge was in there before '55. The actual date, I couldn't give you the actual completion or starting date on that.

[fol. 280] Q. But you know, of course, that the bridge was there from the moment you began working for Amherst. It was there, it was a physical structure. Is that right?

A. I was there before the bridge was.

Q. Working for Amherst then?

A. That's right.

Q. Have the marine ways been moved in any manner from 1955 to the present date?

A. No, sir.

Q. There has been no construction at all to the marine ways in the sense of moving them out of their position?

A. In changing the positions, no.

Q. They might have repaired them otherwise?

A. That's right.

Q. But there is no change in position. Have they built any new houses or warehouses or offices since 1955, the date of Mr. Goett's death?

A. They had the main office in construction.

Q. They have it under construction now?

A. No, it is completed now.

Q. But outside of that, all the physical structures are exactly the same?

A. In that area I would say yes.

[fol. 281] Q. In that area. There are some vessels generally docked in the river. I believe one of them is the Herbert Jones, and there are some other vessels there.

A. That's right.

Q. Are they now docked in the same place that they were docked in 1955 when they came in?

A. That would be a hard question. In other w rds, they are usually docked in the same mooring. In other words, the harbor. It might not be in the exact position.

Q. It is within a couple of feet, would you say?

A. I wouldn't say a couple of feet.

Q. How close would you say they are?

A. It changes all the time. The location of the harbor is the same, but the position of the boats in the harbor would change almost every time they come in.

Q. But relatively little. We are talking about a matter of feet now, but generally speaking the harbor area is the same and the mooring is the same and the boats are docked in the same place. Is that correct?

A. Are you speaking in the area of the bridge pier or of the harbor?

Q. No, the harbor. It is in the same general area?

A. That's right.

[fol. 282] Q. Is the digger boat in the same place that it was then?

A. That's right, yes.

Q. And has the digger boat been changed in any manner or means since 1955?

A. Very slight improvements.

Q. Minor repairs?

A. Minor repairs.

Q. But generally speaking, it is the same?

A. It is the same.

Q. What were those repairs?

A. The only difference would be there is the location of the ramp or concrete pier being built to support the ramp a little bit, changed it from steam to diesel. That's the only changes.

Q. When was the change made from steam to diesel?

A. In the last year, I would say, in the last six months.

Q. Where was the ramp?

A. It is gasoline, not diesel. In other words, it is motor driven.

Q. What about the ramp?

A. The position of the ramp is the same. The only thing is the platform where the ramp sits on or tied to the bank has been changed. We have made a concrete pier [fol. 283] there instead of the way it did lay against the bank.

Q. You made a concrete pier?

A. It makes no change whatsoever in the location of the digger. It is a betterment.

Q. What about the ramp? Is the ramp position exactly the same?

A. Yes, exactly the same.

Q. How is that ramp built? Give us that.

A. You want the complete structure?

Q. Yes. What is it made of first?

A. The base of it is steel.

Q. When you say the base, that's the ramp itself?

A. No, the framework is steel. It has wooden pads on it that can be removed in case of high water.

Q. As I understand it, that ramp is a more or less straight section going out over the water. Is that right?

A. It is straight on top of the digger boat, yes.

Q. And it is on top of the digger boat?

A. In other words, it is mounted on the deck.

Q. It is mounted on the deck of the digger boat?

A. That's right.

Q. At the present time?

A. Yes.

[fol. 284] Q. And was it mounted on the deck of the digger boat at that time?

A. Yes.

Q. What is the change now between the ramp now and the ramp then?

A. Just a concrete pier. There is no change other than the guards that were wooden at the time have been replaced with steel pipe.

Q. Where is this concrete pier that we are talking about?

A. It is just at the upper end toward the port side. Considering the upper river end as the head, it is to the port and to the left of the digger boat, which is mounted in this position.

Q. Like this (indicating)?

A. No, here is the head up the river. Considering this is the head, this is the port side. The concrete pier is located in this area.

Q. You are not talking about the part of the digger boat that is below the ramp, are you?

A. I am talking about the ramp as a whole. The ramp crosses the digger boat and is laid over here on the bank. It is mounted on the head end of the digger boat. In other words, it is built as a part of the hull.

[fol. 285] Q. When you say that the ramp is laying or resting on the deck of the digger boat, do you mean—

A. The framework is sitting on it.

Q. The framework is actually sitting on it?

A. That's right.

Q. Are there any vertical beams or foundations from the ramp down to the digger boat?

A. Yes, sir.

Q. And how long are those beams or foundations, beams, whatever you call them?

A. I would say approximately seven foot.

Q. Seven feet, so that the ramp is not actually lying on the digger boat, it is connected to the digger boat with a vertical beam that holds the ramp up?

A. Actually the rigs are approximately between, I would say, around six foot. Then you have a fifteen inch I beam on top of that plus your wooden ramp that is on top of that.

Q. Where are the beams attached to? The top part is attached to the ramp. Where are the bottom parts of the beam attached to?

A. I could draw you a picture a lot easier, but the beams are attached onto the digger boat, then they are attached to the streamers which form a support for the pads.

[fol. 286] Q. You say that is attached to the digger boat? Is that your testimony?

A. That's right.

Q. The part of the digger boat that these beams are attached to, is that afloat?

A. Yes, sir; a part of it, now.

Q. A part of it?

A. A part of it, yes.

Q. A part of it. Can that part that is afloat be separated from the rest of the digger boat that is not afloat?

A. The whole thing can be removed at times if you want it. In other words, it is built so it can be removed in case of high water.

Q. In other words, it is in sections?

A. That's right.

Q. It is in two sections. The digger boat—

A. No, the digger boat is not. The digger boat is in one piece. It is the ramp that is in two sections.

Q. I am talking about the digger boat.

A. The digger boat is in one piece.

Q. The part of the digger boat these beams, the vertical beams are attached to, is that afloat? Is that part of the digger boat afloat in the water?

[fol. 287] A. Yes.

Q. Is the entire digger boat afloat in the water?

A. Yes.

Q. Is any part of the digger boat stationary to the shore?

A. A part of it; I would say the ramp is a part of the digger boat and it is resting on the shore.

Q. Forgetting for the moment the ramp, is any other part of the digger boat attached to the shore?

A. No.

Q. This part of the digger boat that supports the vertical beams leading to the ramp, is that actually attached, is that actually part and parcel of one structure consisting of the entire digger boat, or is that a separate structure attached to the rest of the digger boat?

A. Would you go over that first section there again? I didn't quite get that.

Q. Is the part of the float that supports the vertical structures leading to the ramp part and parcel of the same structure of the entire digger boat, or is that a separate part of the digger boat?

A. The digger boat is the whole thing. In other words, this ramp is set on the digger boat, is mounted as a unit [fol. 288] on the digger boat.

Q. Forgetting for the moment about the ramp, I am talking only of this float that supports the ramp, but let's for the moment forget about the ramp. Is this float attached to the digger boat or do you consider it a part of the digger boat?

A. It is the hull of the digger boat.

Q. It is the hull of the digger boat?

A. It is the hull, that's right.

Q. Could it be separated from the rest of the digger boat, the one part that supports the ramp?

A. No, and stay afloat.

Q. Could it be disattached, could it be separated from the rest of the digger boat, or is this all one structure, the float part of the digger boat?

A. That's right, it is all one structure.

Q. Is it all structurally connected to the digger boat?

A. It is all welded.

Q. And it is part and parcel of one structure?

A. It is one hull.

Q. Is that the same structure that was there in October of 1955?

A. Yes.

[fol. 289] Q. It is all the same. Will you identify or can you identify this picture?

A. That is the complete picture of the harbor and ways of the Amherst Barge Company.

OFFER IN EVIDENCE

Mr. Goldstein: May I offer this?

Mr. Love: Not unless you show it to us.

(Handing picture to counsel for defendants.)

Mr. Goldstein: If your honor please, there is no objection to the marking of this in evidence.

Mr. Love: I can't hear. I am sorry.

The Court: Admitted.

Mr. Goldstein: There is no objection is there?

Mr. Love: Yes, sir, unless we can have a copy of it.

The Court: Admitted in evidence.

Mr. Goldstein: Thank you, sir.

The Clerk: Plaintiff's Exhibit Number 5.

Plaintiff's Exhibit No. 5.

The picture referred to was marked as indicated above and filed in evidence.

Mr. Love: Did your honor admit it?

The Court: There is no question as to its authenticity, is there?

Mr. Love: We know nothing about it at all.

[fol. 290] The Court: I haven't looked at it. Better let me see it.

Mr. Goldstein: I will show it to you in a second, sir, as soon as the clerk finishes marking it.

The Court: What is the objection other than the fact that you were not furnished with a copy?

Mr. Love: I just don't know anything about it at all. We don't have a copy of it, never saw it before. We think we are entitled to a copy of it.

The Court: You should be given a copy of it, but the fact that you don't have a copy would not make it inadmissible in evidence. If there is something about the picture itself that does not correctly show what it purports to show, then it would be objectionable; but if you don't know of any such defect as that, I don't see any reason for not letting it in.

Mr. Johnson: I would like to ask Mr. Goldstein if the picture is being introduced for the purpose of showing the general layout of the Reed dock area or if it is introduced to contradict some part of Mr. Martin's testimony. If it is introduced as a picture of the general dock area, we have no objection to it.

Mr. Goldstein: It is introduced as a picture of the general barge area and not to contradict Mr. Martin's testimony.

[fol. 291] The Court: All right.

Mr. Goldstein: Your honor has seen the picture?

Q. Mr. Martin, can you tell us first the structure, the full structure, the number of beams and the location of the beams leading down from the ramp to the section of the digger boat underneath? First of all how many beams are there?

A. There is eight beams.

Q. And are they all vertical beams?

A. Vertical.

Q. And how far are they placed from each other?

A. In the area there of—in other words, in which way are you speaking?

Q. Well, in relation of one to the other.

A. They are all different sizes. They are all different dimensions.

Q. They are all different dimensions?

A. That's right. They are spaced pretty close equally to support the ramp that we have on there.

Q. Can you tell me the geometric pattern these beams are placed in? Do you understand the question, sir?

A. No, I don't. I don't know what you are trying to get at. I can show you there just about exactly how they are placed.

Q. I would appreciate it. Just draw the top view look- [fol. 292] ing down. I want to get the position of the beams on the digger boat.

A. On the digger boat?

Q. That's right.

A. You are talking of the vertical beams?

Q. That's right, the vertical beams.

A. You want your cross beams?

Q. Yes, please.

A. (Drawing on blackboard.) This is considered as your cross beams. Now, these are tied, the two beams together here. This, then, has a supported beam which comes out and runs this way over top of these. There is another one, and there is two more beams in here which carries the load, over top of those.

This, then, there is a support made up on the ends of these, which is a six inch schedule eighty pipe. Then that goes from here to the bank and this ramp rests on it. This moves here up and down with the rise and fall of the water.

This has—over here is your mounting that this goes on on the ways. This has a seven-eighths line coming to the digger boat here. Also we have a seven-eighths wire line coming in here, one into an anchor here, which makes it a permanent line there unless there is extreme high

water. These are then removed. The back end of the [fol. 293] digger, which is resting against this pier, is also with a line and a large tire in between this and the pier for rubbing purposes.

Q. When you say the pier do you mean the bridge?

A. The bridge pier. On your picture you will notice that that digger boat there is resting against the bridge pier. There is only a tire between it and the bridge pier.

Q. First of all, let's get the dimensions clear—can everybody see this—clear in our minds. How wide is the digger boat at the part of the boat right under the ramp?

A. That is approximately thirty to thirty-two foot.

Q. How wide are each of these vertical beams, the eight vertical beams?

A. You want your vertical beams? They are an eight inch H column.

Q. Eight inch H column?

A. That's right.

Q. So that it is eight inches across from here to here.

A. That's right. It is just schematic of how it is put in. If I was going into detail it would take quite some time to do it.

Q. It is in this shape?

A. That's right. It is an H column.

Q. Is that right?

[fol. 294] A. That's right. It would be square. An H column is square.

Q. But is that the way the H runs? It doesn't run the opposite way? It could run this way? It doesn't, though, does it?

A. No, it runs that way like this one here.

Q. This way, did you say?

A. This way.

Q. This way?

A. On the back side only. These others are pieces in here. We have some pieces in there which is eight inch pipe making support.

Q. Which is the pipe?

A. The center four there.

Q. These four?

A. That's right.

Q. You say they are pipe?

A. Yes.

Q. Are they circular in cross section?

A. Yes.

Q. What is the diameter of those circular pieces?

A. They are—I don't remember whether those are eight inch pipe or whether they are ten, but I believe they are [fol. 295] eight, which would be eight and three-quarters O. D.

Q. Can you estimate the amount of space in between each of these?

A. I couldn't give it to you offhand to be exact. It is equally spaced across the beam. The outer beams are stepped in approximately a foot from the nosing of the barge, of the float.

Q. How close are those outside H beams to the edges of the float?

A. I said about a foot.

Q. About a foot?

A. Yes.

Q. So that you have a foot and then about eight inches and a space another eight inches and a space?

A. No, you wouldn't have it spaced that way. They would be spaced equally across there, which would be in three equal spaces over all.

Q. There would be three equal spaces between this section?

A. Yes.

Q. And in between each space there is either an H beam or pipe?

A. The way I would draw that would be on centers equally spaced all the way across there.

[fol. 296] Q. And you say the entire thing is about—what did you say?

A. Thirty to thirty-two foot wide. That's just offhand. I don't know the exact measurements because they run different in different digger boats that we have.

Q. You made a number of further lines running across the section. What do those lines represent?

A. Those are fifteen inch I beams.

Q. How thick are the I beams?

A. They are different in thickness. In other words, they were not—in other words, we didn't buy it up. It was material we had on hand that we used on that, which is plenty stout for what we use it for. It is plenty strong enough to support anything we want to put on it.

Q. Are they spaced equally?

A. Yes, they are spaced equally.

Q. And how many are there?

A. There are four.

Q. And how high off the digger boat are they?

A. I would say estimating, actually I would say it was around six foot.

Q. Around six feet?

A. Yes, and then your I beams comes on top of that, [fol. 297] which you have got about seven foot to the top of the I beam—

Q. When you say I beams you mean these?

A. No.

Q. You mean these?

A. No. Those are your posts. The I beams, stringers through there, run on top of your posts.

Q. I am not talking about these. Are we talking about the same thing? I want to get clear on that.

A. That's what I want to know.

Q. I am talking about these lines running aboard the ship.

A. That is a down position, looking on it. In other words, from the top of the ramp looking down through it. It is just a schematic or just a sketch of it.

Q. Let me draw the lines I am talking about.

A. Those are fifteen inch I beams.

Q. Those are the I beams you were just talking about. Is that right?

A. Right.

Q. Those I beams are the ones that are six feet above the deck of the digger boat?

A. In other words, the bottom of them is approximately six foot.

[fol. 298] Q. The bottom of them is approximately six feet?

A. That's right.

Q. Then I go over to these lines running from the front of the digger boat to the back. This I assume is the head.

A. This is the head, upstream end, considered the head.

Q. Then we will talk about these lines, the four lines connecting between the vertical posts. How high are they off the deck of the digger boat?

A. They are the same height. These other beams, the two outside ones, run completely through from one end to the other and one side of the digger boat to the other, which is stepped back from each edge.

These others will run from post to post, between the two posts. Then the other beams will sit on a saddle or an angle clip, which makes it a part of a complete unit, which is all bolted and welded.

Q. And it is all the exact same pieces?

A. That's right, within reason.

Q. Within reason. Of course. And it is all six feet?

A. Approximately six feet.

Q. The section aboard ship and the section running from the head of the vessel back?

A. Yes.

[fol. 299] Q. Six feet above the deck of the digger boat?

A. Approximately.

Q. Give or take a few inches. It might be take a few inches, might it?

A. That's right.

Q. Are you familiar with the CC-204 as it docked in October 1955?

A. That's right.

Q. You were aboard the vessel?

A. That's right.

Q. Can you tell us how the CC-204 was moored?

A. Yes, sir.

Q. To the head of the digger boat?

A. We have two bumpings or knees, what you call, here. They have a brace that runs back in here which is a pipe brace, back in here to the hull. There is two of them. CC-204 was moored against these two. Her outboard side was flush with the outside. Any overhang we usually have it on the inside rather than have this here sticking out. This has a kevel.

Q. That's on the barge?

A. That's on the end of the CC-204. This is then brought back to two double bits or timberheads, we call them, on each side.

[fol. 300] Q. They are not welded to the deck?

A. Of the digger boat. The ends are tied into the barge from the kevel on this side to the barge and a kevel on this side here. At times we tie this one into our rubbing or safety guide on our ramp.

Q. You mean from the kevel to the rubbing or safety guide on the ramp?

A. Yes, we can do that at times.

Q. The ramp is the section above the digger boat?

A. Yes.

Q. Did you do it at that time in October 1955?

A. This was tied in here.

Q. Did you have anything running from the kevel on the end of the barge to the digger boat?

A. Not in here, no, because we were carrying material this way off the ramp onto the barge. That's the way we handle it.

Q. What is this here?

A. That's a pipe support that's underneath.

Q. Underneath the deck?

A. Underneath the ramp.

Q. How high above the deck of the digger boat is that?

A. You don't have enough blackboard here.

[fol. 301] Q. I would prefer turning the blackboard around.

A. This is a side view. This shows CC-204 mounted against the head end of the digger boat. This is our ramp. This shows the brace which is on the other side from this, as we call it, the knee. This is a pipe brace welded to the deck. This is permanently welded to the digger boat, which takes up any shock of this boat moving.

This boat was tied in, as you see, with our double bits. This shows how that is mounted. This is the height of the ramp. These are the guards up on the other kevel which can be tied in to this for extra support or just an extra line.

Q. Yesterday I believe you testified there was a ring, a life preserver, aboard the digger boat.

A. Yes, sir.

Q. Where is that life preserver?

A. I cannot show you on this digger boat.

Q. Can you show us on the picture?

A. Yes. This is mounted—

Q. I would appreciate it if you wouldn't write on it, but kindly point it out to the Judge. Will you step forward if you wish, please.

A. If you get a magnifying glass you can also see it. All I have to do is to locate it for you. It is on this leg [fol. 302] right here. Get a magnifying glass and you can see it. It is hanging right there.

Q. Will you point it out to the Judge?

A. Yes, sir, it is right here.

The Court: That is almost midway from the front to the rear.

The Witness: Well, actually, in other words, what we call—this is almost a quarter. What are you looking at there, Judge? Your honor, this is a barge on the outside of the digger boat. This is the standard coal hopper barge. My drawing will show at the end of this ramp, of the end of this—

The Court: That's a little over a third of the way.

The Witness: That's about a third, I would say, at the most.

Q. Am I correct, is it a fair statement to say that the lifesaving ring is past the ramp on the digger boat?

A. On the downriver side.

Q. On the downriver side? It is?

A. That's right.

Q. What is the only way of reaching that lifesaving equipment from the barge? First of all—

A. There is two ways.

Q. All right. May I have both?

[fol. 303] A. This digger boat is most always manned by a man or a digger boat operator. We have a set of steps that comes down here, this set of steps with a handrail.

Q. Where does that lead?

A. To the deck of the digger boat.

Q. From where?

A. From the ramp. That's the only way of getting down here to the digger boat. Most usually there is a man when we are working barges the other side, there is a man on the digger boat at all times.

Q. Do you know if there was a man on that digger boat on October 5th, 1955?

A. Not at the time of the accident.

The Court: You mean there was not or you don't know.

The Witness: As far as I know. In other words, with the work that we had going on, as far as I know we didn't have one on at that time.

Q. What is the second way?

A. Anywhere here if you have a barge alongside here the man could, in other words, go to the barge.

Q. That's from another ship?

A. That's from another boat, floating.

Q. But assuming the absence of any other boat, the only [fol. 304] way to get on that digger boat is by that ladder running from the ramp to the digger boat. Is that correct?

A. That's right. In other words, from here to here. That's the way it is mounted all the time.

The Court: Mr. Martin, you called it a set of steps and counsel called it a ladder.

The Witness: It is not a ladder. A ladder has rungs. This has risers.

The Court: A set of metal steps?

The Witness: Yes.

Mr. Goldstein: I stand corrected.

The Witness: This has your risers to it. In other words, it is a set of steps.

Q. And that leads from the top of the ramp down to the digger boat?

A. From the surface of this ramp down to the digger boat.

Q. How do you get from the barge to the ramp?

A. From this barge?

Q. That's right.

A. Well, you can step across there. This was only about a three or four inch differential between the height of this barge here. We took all of our equipment over here from this ramp.

[fol. 305] Q. How high is the ramp above the water or how high was it on October 5th?

A. It was the same as it is now. I would say in the neighborhood of seven and a half to eight foot.

Q. Seven and a half to eight feet?

A. Yes, sir.

Q. Did you say that the vertical beams are about six feet?

A. That's right. In other words, these are all mounted in here, you see.

Q. And that's six feet.

A. That's right. In other words, here is approximately six feet in here. Then you have fifteen inch beams here and those are set down there. They have pads on these and this is four inches. So you can figure this.

Q. Between seven and a half and eight feet?

A. That's right.

Q. You were on the CC-204. Is that right?

A. That's right.

Q. And the CC-204 where the men were working, that is the center of the barge where they were trying to save Goett was testified to as being approximately nine feet above the water.

A. That's right.

[fol. 306] Q. Agreeing with that figure for the moment—

A. All right. This is six—

Q. I haven't finished my question yet. Agreeing with that figure of nine feet from the middle of the barge for a moment, I notice you have drawn an incline toward the front of the barge. How high is the incline, the total incline from here?

A. That's approximately a foot.

Q. That's approximately a foot?

A. Yes.

Q. So that from this part it would be ten feet—is that correct—from the water?

A. That's correct.

Q. Assuming this is right.

A. It could be a little over that.

Q. It could be ten and a half?

A. Yes.

Q. Do you think it could be eleven?

A. It could be. May I mention one thing here?

Q. Go ahead.

A. You haven't taken into consideration the distance from here to the point on your digger boat.

Q. Oh, I will.

[fol. 307] A. All right, sir.

Q. This entire section was seven and a half to eight feet. Is that what you said?

A. Yes, this is six. This is close to eight feet, yes.

Q. How high is the digger boat from the water?

A. Depending on whether this is loaded or not, this is approximately, I would say, two foot to thirty inches.

Q. Two feet, that would be two and a half feet?

A. That's right, approximately.

Q. It would be just within six inches of a foot, did you say, of being level? Is that right?

A. I beg your pardon?

Q. Is that what you said before, it would be within six inches or a foot of being level?

A. Yes. In other words, this distance here. You had a drop from the top of this to your barge, because the equipment going over, we had to raise it over this and we had to drop it here. You couldn't run it right over there. You had a four to six inch drop.

Q. What equipment did you have? This was from the ramp to the barge?

A. No, the equipment that we were using on there, such as sandblaster and fan, we have a four wheel truck that we [fol. 308] move all this with.

Q. At the time of Goett's death did you have any equipment in that area on the ramp?

A. As I remember, no; not on the ramp here.

Q. How many steps, how many stairs or steps were there in that stairway leading from the ramp down to the digger boat surface or deck?

A. Approximately eleven steps I would say here, but you

have another one here and, of course, a landing. There is around eleven steps.

Q. How far would you estimate the lifesaving equipment would be from the bottom of the stairway?

A. As the crow flies, or how you had to go get it?

Q. As you had to go get it.

A. I would say fifteen foot.

Q. And how wide is the ramp?

A. That is a fourteen foot timber there, which gives you twelve foot inside here.

Q. Is the stairway absolutely flush with the ramp or do you have to go up, down or around to reach it?

A. No, you step over this guard rail here for your first step.

Q. I see.

[fol. 309] A. This is a safety here to keep any equipment from backing off. It is more or less a safety measure.

Q. That's a guard rail you have to step over to get on the stairway?

A. Yes. You have a handrail and you have good support there from your handrail.

Q. And was there a guard railing on this side?

A. No, sir.

Q. Assuming that a man wanted safety equipment and he was approximately 160 feet away from this edge of the barge, in other words, he was down here somewhere, is it your testimony now that in order to get the safety equipment on the digger boat you would have to first run 160 feet; two, jump from the barge to the ramp—

A. He would step.

Q. He would step. It is a foot and a half, you say.

A. No, no. In other words, your first step would be to the top here, then down. In other words, it is just like stepping from this step here down to this. In other words, that guard rail is not so high a man can't step over.

Q. What did you say the thickness of that section in here is?

A. I didn't say.

[fol. 310] Q. What is the thickness?

A. This, I think, is an eight inch H column.

Q. In other words, he would have to step from the barge across an eight inch open space, over here and down?

A. This comes out over this just slightly. In other words, a man wouldn't have to step much over a foot at the most at any time there to get to the center of that.

Q. And would he have to step up or down to get to the ramp?

A. Actually, the man, if you wanted to take it in technical terms, he would have a four inch rise, but a man in a hurry would never hit this. A man would step from here over into the middle. If he was running this 100 foot, he would never touch this.

Q. But he would have to cross the ramp?

A. That's right.

Q. Then he would have to step over the one guard rail?

A. That's right.

Q. Then he would have to go down the stairs?

A. Yes.

Q. Then he would have to go fifteen feet?

A. Yes.

Q. And he would have to take the safety equipment off [fol. 311] the hook or line?

A. That's right.

Q. How was that attached?

A. It was just laying in there. In other words, a man can get it at any time. It is not fastened.

Q. Not fastened in any way? Then he would have to take the safety equipment, the ring, whatever it is—

A. That's right.

Q. —and he would have to hold it, and holding it he would have to run back the fifteen feet?

A. Yes, it would be just the reverse.

Q. He would have to go up the stairs, across the guard railing, across the ramp and then back 160 feet?

A. Yes.

Q. And that's the closest safety equipment that was available on this particular day. Is that right?

A. That's right.

Q. Mr. Martin, will you kindly draw a line from the safety equipment vertically up to where the clouds are shown with an X? I want you to mark a vertical line up

so that we can pinpoint the safety equipment at a later date.

A. I made a mark on there. In the light you can see it.

Mr. Goldstein: May the record show that the X marked [fol. 312] by Mr. Martin is the location of the safety equipment?

Q. Would you consider it cautious and prudent upon any man to attempt to jump in order to avoid going that way that we have just discussed, prudent to jump from the barge down to the deck of the digger boat and run across there?

A. In a case of emergency there is lots of things you might do that might seem foolish otherwise.

Q. It would seem foolish otherwise?

A. Other than this time.

Q. Otherwise?

A. That's right.

* * * * * * *

Q. Mr. Martin, can you mark this picture with a Y showing us the supply house where the life jackets were kept?

A. You want it with a Y?

Q. With a Y.

A. Do you want it lined up?

Q. Yes, please.

* * * * * * *

[fol. 313] The Court: About how far in feet is that from the nearest access point to the CC-204?

The Witness: From the nearest point of that barge is approximately 300 feet, I would say.

* * * * * * *

Cross examination.

By Mr. Johnson:

Q. Mr. Martin, is there at the present time any kind of a float or flat lying forward of the digger boat?

A. There is at this time.

Q. Was there on October 5, 1955?

A. As a unit, no.

Q. All of that flat or float that's lying forward of the digger boat now—

A. At the present time it is a part of digger number two, which we had cut in two on our marine ways some time ago to make a shorter unit.

Q. That was not there?

A. That was not there and, of course, the indication in that picture there, of course, that barge has disclosed that that is there now.

[fol. 314] The Court: Is that at the lower end?

The Witness: That's at the upper end now. It was a part of another piece of equipment.

Q. This picture here, which you have testified with respect to, which is the plaintiff's Number 5, shows in the left hand portion of the picture the digger boat about which you have testified?

A. Yes, sir.

Q. There is a hull of some kind apparently lying outboard of the digger boat. What is that?

A. This is a cabin that was built on the float, as I stated previously, was part of this digger boat Number 2, which we made into a working float, which we have now put against this to give us more area there for workmen. And the other smaller boat that you see in there is the Laura J., which we were working on at the time the picture was taken.

Q. What is the long object lying outboard of the digger boat in that picture?

A. That is a standard coal hopper barge which is 2617511.

The Court: This added float, as you call it, is the thing that you see upriver from the upper edge of the ramp?

The Witness: Yes, sir. As the picture shows, your honor, this is the end of the ramp right here. In other words, [fol. 315] this is the upper end of the digger boat which I have in my sketch over there tried to accomplish. This float, in other words, you could see this building on this float, which was a housing built on the digger boat for a hoisting engine for use when it was one unit.

The Court: At the time of this accident the upper rim of the ramp was the upper part of the digger boat?

The Witness: That's right. In other words—

The Court: Upper edge, I mean.

The Witness: That's right. This is the upper end of the digger boat at the time CC-204 was there.

* * * * * * *

HELEN COLCORD called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.
The Witness: Helen Colcord.

Direct examination.

By Mr. Pauley:

Q. You are Mrs. Helen Colcord, are you not?
A. Yes, sir.
[fol. 316] Q. Where do you live, Mrs. Colcord?
A. Nitro, West Virginia.

Mr. O'Farrell: I can't hear the witness, your honor.
The Witness: Nitro.

Q. Mrs. Colcord, what is your vocation?
A. Housewife.
Q. Do you have any other vocation or avocation?
A. I teach swimming, lifesaving.
Q. Swimming instructor, you say?
A. Yes, volunteer.
Q. I beg your pardon?
A. Volunteer swimming instructor.
Q. How long have you been a swimming instructor?
A. About twenty years.
Q. What phases of swimming or water safety does a swimming instructor deal with?
A. Swimming, lifesaving and water safety.
Q. And when you say water safety, what do you mean by that?
A. Safety around water fronts.
Q. Protection of life around the water?
A. Yes, sir.
Q. Are you connected with any accredited association [fol. 317] on water safety and swimming?
A. American Red Cross.

Q. And what is the extent of their program in this country, if you know?

A. Well, we have had the program in the Red Cross for about the last thirty-five years now, and it is to teach lifesaving and water safety to as many people as we can teach it, and it is accredited through all organizations, any safety organization.

Mr. Love: I am sorry, we can't hear.

The Court: You can talk louder than that. Just raise your voice.

The Witness: I am scared.

The Court: You don't need to be scared.

The Witness: We teach to all safety organizations, and it is accepted by the armed forces and Boy Scouts and Girl Scouts and any other organization that has to do with safety.

Q. You have never been in court before?

A. No.

Q. Just lean back and take a deep breath and take it easy. Nobody is going to bother you. Mrs. Colcord, how many students have you instructed and qualified for water [fol. 318] safety training under the Red Cross program since you have been teaching livesaving?

A. Oh, between five and eight hundred, at least.

Q. Just a little louder, now.

A. I would say between five and eight hundred, at least. I don't have any idea how many.

Q. In the instruction of lifesaving and water safety, are you familiar with the various water safety devices that are used in rescue work?

A. Yes.

Q. Will you name some of them, please?

A. Well, the simplest is just a pole.

Q. A what?

A. Is a bamboo pole or any kind of a pole; that's a simple one, just a plain line. Then we have a heaving line which has a knot in the end of it.

Q. Let me interrupt you there for a moment. You say a plain pole, just an ordinary stick or pole. Is that right?

A. We usually use a bamboo pole, a long one.

Q. How is that used in rescue work?

A. To reach, just hand it to them.

Q. I beg your pardon?

A. Hand it out to the victim, try to put it in the middle-[fol. 319] of their chest where they can grasp it quickly, not over their head or some place.

Q. Assume they are under water and are going down.

A. Well, you can stick it under the water and they will grab it if you hit their body with it around their stomach or their chest, they will grab it.

Q. I think you said another apparatus was a throw line.

A. Just a plain line that can be thrown.

Q. Just a plain manila line?

A. Yes.

Q. Where and how is that used in water safety?

A. Well, someone stands either on the dock or on the beach and just throws it and you hold onto the other end and they can grab it and you can pull them back in safely.

A heaving line will go further because it has a knot in it. You tie a knot in the end of it which weights it and you can throw up to forty or fifty feet with a heaving line. A throw line, you couldn't go much more than twenty or twenty-five feet with just a plain line.

Q. And that throw line is an ordinary rope with a knot on the end of it?

A. Yes.

Q. Are you familiar with any other water safety devices? [fol. 320] A. Ring buoys.

Q. What?

A. The ring buoy.

Q. Will you describe that to us, please?

A. Well, a ring buoy can be either just a plain buoy which weighs about two and a half pounds and about fifteen inches maybe across, filled with cork and covered with canvas, and you can just sometimes have the ring buoy by itself and throw it.

Most of them now have a rope attached, a sixty foot length of rope, which is much better than throwing just the ring buoy, and when you throw it they can grasp it and you can pull them back in with the rope.

Q. Isn't it a fact that there is a rescue known as the swimming rescue?

A. Yes, sir.

Q. Are you familiar with that type of rescue?

A. Very much so.

Q. Will you tell us when and where that type of rescue is used?

A. The swimming rescue should never be attempted unless there is no other way, and then only by an expert lifesaver. We beat that into the kids until we are blue.

[fol. 321] Q. If a person were dressed in working clothes and had boots with steelplated toes on their shoes, what in your opinion is the possibility of that person making a successful swimming rescue if he has had no lifesaving experience.

A. Very little.

Q. I believe you said that throw lines—is that what you call them?

A. A throw line has a knot in the end of it.

Q. And what was the other line?

A. The heaving line.

Q. What?

A. The heavin; line. The throw line is a plain line, any piece of rope you could find around. A heaving line has a knot, we call a monkey fist which you put into the end of it, which gives it weight, and also the victim can grab hold of it and pull themselves in.

Q. I believe you said you find throw lines around docks. Is that right?

A. Almost every one I have seen where I have taught and everything, we have to have them.

. . . . . .

[fol. 323] By Mr. Pauley:

Q. In your opinion, Mrs. Colcord, based on your experience and your study of the subject, are life lines or throw lines attached to docks good water safety practice?

A. Yes, sir.

. . . . . .

Q. How many docks have you seen in your experience as a water safety expert, Mrs. Colcord?

A. Oh, I don't know; probably fifteen, twenty.

Mr. Johnson: What does she mean by a dock?

By Mr. Pauley:

Q. What do you mean by a dock, Mrs. Colcord?

[fol. 324] A. Well, some of the docks I have seen have been just landing docks, landing docks, been up at Nantucket and up on the Cape and down on the east coast and other docks. I am talking about our places where we have taught swimming from regular swimming docks, in other words, specified swimming area.

Q. Mrs. Colcord, assume that the dock is a floating dock 200 feet long and thirty-five feet wide with a flat deck. The distance from the deck to the surface of the water is nine feet, and the dock is moored in deep water. There is no rail around the dock. On the dock people were at work doing jobs such as sandblasting with hoods over their heads or working in the open, and there was no railing around the edge of the dock at all.

In your opinion what would be in that case, based on your experience and your study, the most elementary and efficient water safety installation to preserve life in case a person fell overboard from that dock?

Mr. Love: We object to that, your honor.

Mr. Johnson: We object.

The Court: Talk one at a time and tell me your objection.

[fol. 325] Mr. Johnson: Your honor, we object on the ground that the witness is not qualified to answer the question in the first place so far as has been shown, that the question misdescribes the situation in the second place. It refers to this barge as a dock, and the question does not completely state the facts in evidence in this case.

We think it is an improper hypothetical question. We think the witness has not shown any qualification to answer, and we think, furthermore, it is not a proper subject for expert opinion.

The Court: What is your objection, Mr. Love?

Mr. Love: And in addition to the grounds assigned by Mr. Johnson, in which we join, we have the additional

ground that the Coast Guard, which we presume is the authority on this matter, does not require any such equipment on barges such as is involved in this case.

Mr. Pauley: Your honor, that's on unmanned barges. I am willing to change the word Mr. Johnson said from dock to barge, and as far as the Coast Guard regulations are concerned, these are unmanned barges.

This barge here, when you take into consideration all the facts, it could never unload itself or load itself without being manned, and the pictures that we have used here [fol. 326] in evidence which were furnished us by the defendant show a man wearing a life jacket. I am basing it also, your honor, on the fact that she said she was familiar with the literature and had studied the subject of water safety.

The Court: If she is familiar in any way with regulations applying to the use of barges in this connection, then I will admit her testimony, but merely as a swimming instructor who may have studied the subject of lifesaving, I don't believe that she has shown qualifications to answer this question about the proper equipment for barges.

Mr. Pauley: If your honor please—

The Court: You may ask her further and see whether she is qualified in that field, if you wish.

By Mr. Pauley:

Q. As a swimming instructor, do you also make a study of water safety?

A. Yes.

Q. And what does the subject of water safety pertain to?

A. Lifesaving and safety around bathing places, and around riverfronts and boating places, but by boating places, Mr. Pauley, Mr. Moore, Judge Moore, as far as barges and things and commercial businesses, we have nothing to do with. I know nothing about that part except as far as general safety rules for small craft and things like that.

[fol. 327] Q. Would you be able to express an opinion, say, on a dock area of 200 feet by 30 feet, would you be able to express an opinion upon what you have read and

upon your experience as to what type of lifesaving equipment should be placed on that area?

Mr. Love: Objection.

The Court: You are still talking about docks, Mr. Pauley. I will sustain objection to that question.

* * * * * * * *

[fol. 328] Alva Fultz Applegate called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Alva Fultz Applegate.

Direct examination.

By Mr. Sampliner:

Q. Captain Applegate, keep your voice up so we can hear, all of us can hear back here. What is your address?

A. Vanceburg, Kentucky.

Q. And how old are you?

A. Forty-eight.

Q. What is your profession?

A. Well, I am a master and pilot on the rivers.

Q. How long have you been master and pilot?

A. I have held a master's license since 1947, I believe, '47 or '48.

Q. And on what waters?

A. Waters flowing into the Gulf of Mexico.

[fol. 329] Q. Is there any higher rating on these waters than what you have obtained by passing examination for the United States Coast Guard?

A. Not on steam and motor vessels, no, sir.

Q. Are you a master mariner?

A. Yes, sir.

Q. How long have you been a master mariner?

A. Since 1947 or '48.

Q. When you say a master mariner, what does that mean?

A. That's in charge of all operations of the boat while under way or in the harbor.

Q. When did you first go to sea?

A. In December, I think it was, 1926.

Q. And in what capacity did you go to sea?

A. As a dishwasher.

Q. And after you were a dishwasher in 1926 on these rivers, then what was your next capacity as you sailed?

A. Well, I worked at that I will say four or five months and then went as a deck hand.

Q. And then in your step up what was your next capacity that you signed on these various inland waterway boats?

A. In 1932 I taken the examination for mate of inland steam and motor vessels of all gross tons on the Mississippi [fol. 330] River and tributaries and passed.

Q. What was your next step up the ladder? What did you take, what examination did you take after that?

A. As a first-class pilot.

Q. And did you pass that?

A. Yes, sir.

Q. What year was that?

A. That was in 1943.

Q. And then did you take your master's license after that?

A. In 1947 or '48. I forget just which it is.

Q. As to your experience, will you kindly tell the court how many years you have spent on these rivers?

A. Well, in the neighborhood of twenty-eight or twenty-nine years, between twenty-eight and twenty-nine.

Q. As to your experience, Captain, try to name the companies that you have worked for in those twenty-eight years. By the way, first of all, are you acquainted with the waters around Charleston, West Virginia?

A. Yes, sir.

Q. And you have sailed in these waters?

A. Yes, sir.

Q. Tell us the companies you have worked for during [fol. 331] the last twenty-eight years, to the best of your recollection.

A. Well, I couldn't name them all. I can name you a few of them. United States Steel, Crucible Steel, Dravo Corporation, American Barge Line, Mississippi Valley Barge

Line, Union Barge Line, Keystone Sand and Gravel. I could keep on all day if you want to.

Q. Have you sailed as master for those companies?

A. I have sailed as master for United States Steel and Crucible Steel.

Q. Have you sailed the entire length of the rivers?

A. Yes, sir.

Q. The waters around Charleston, West Virginia, are they navigable?

A. Yes, sir.

Q. Captain, have you been in the courtroom since the inception of this case?

A. Yes, sir.

Q. Have you heard the testimony?

A. Yes, sir.

Q. Now, Captain, are you acquainted with the locale of the Amherst Barge Line Company works?

A. Yes, sir.

Q. Will you tell us, Captain, handing you Plaintiff's [fol. 332] Exhibit Number 5, as to whether or not you have viewed that same view with your own eyes?

A. Yes, sir, I have, both passing on the boat and from the opposing shore.

Q. You say passing on the boats and from the opposite shore. You mean as you piloted in your past experience you have been in these waters?

A. Yes, sir.

Q. Now, have you had an opportunity to observe the drawings that Mr. Martin made here as far as the kevel here and the rake of the vessel here, the freeboard? Do you understand all of these pictures?

A. Yes, sir, I do.

Q. And also as far as the timberheads and bitts? Is that right?

A. Yes, sir.

Q. And do you recognize the drawing that Mr. Johnson made at the inception of this case as he outlined his defense in this case?

A. Yes, I recognize part of it.

Q. All right. Now, Captain, I am going to hand you

Plaintiff's Exhibit Number 1 and I will ask you whether or not you can identify it as to what that vessel is.
[fol. 333] A. That is a loaded tank barge. Who it belongs to I couldn't tell you.

Mr. Love: I can't hear you.

A. That is a loaded tank barge.

Mr. Sampliner: If your honor please, as I understand it, these pictures were turned over to us by one of the respondents here, the Union Carbide. I would like to have these pictures identified. I think they will be admitted by agreement. Is that right, gentlemen? These are the pictures turned over to us.

Mr. O'Farrell: Yes, if we can see them.

Mr. Love: We furnished these pictures to plaintiff. I don't know the time that they were taken.

Mr. Sampliner: That's all right, sir.

Mr. Love: If any of those things become material we would like to reserve the right to so qualify them.

Mr. Sampliner: You did furnish these pictures to us?

Mr. Love: In person.

OFFERS IN EVIDENCE

Mr. Sampliner: Thank you kindly, sir. I would like to have these pictures marked, your honor. They have been turned over to us by the Union Carbide and marked as part of our case, please, and introduced into evidence and ad-
[fol. 334] mitted as such.

The Court: Admitted in evidence.

Mr. Sampliner: Your honor, sir, would you like to look at these pictures?

The Court: Yes.

The Clerk: Plaintiff's Exhibits Numbers 6 to 11, inclusive.

Plaintiff's Exhibits Nos. 6 to 11

The pictures referred to were thereupon marked as indicated above and filed in evidence.

Q. Taking the picture which is marked Plaintiff's Exhibit Number 5, can you differentiate—we have already had the

X marked as far as where the ring buoy is, as far as the digger is concerned, and Y as far as the supply house is concerned by Mr. Martin. Can you take this picture, sir? Would you be kind enough just to differentiate as to the drawing that Mr. Johnson made? In other words, are these ways here, are they adjacent to the landing where the towboats are moored?

A. No, they are not.

Q. Can you tell us, Captain, from your observation what is the distance to the best of your observance and knowledge and estimate from the digger vessel to the supply house? [fol. 335] How far would you say?

A. I would say approximately 500 feet, five to 600 feet.

The Court: I think you should know at that point that the testimony given by Mr. Martin as to the distance of 300 feet represented to the nearest accessible point on the barge, not to the digger boat.

Mr. Sampliner: The distance of this barge, the length over all is what? I believe the fact has been given to the court. It is 195—is that right—195 feet?

Mr. Pauley: 195.

Q. What is your estimate as to the distance from the ramp to the towboats?

The Court: What do you mean by the towboats?

Mr. Sampliner: Towboats that were moored upstream at their landing.

Mr. Johnson: When?

Mr. Sampliner: From the picture.

A. Well, I would say it would be between 800 and a thousand feet or more.

Mr. Love: Pardon me. Do I understand he is making that estimate from looking at the picture?

Mr. Sampliner: Yes, sir. I understand the condition has not been changed since October 5, 1955 and the picture [fol. 336] which was taken yesterday mounted on that plat. and Mr. Martin said there is no physical change.

Mr. Love: We object, your honor. That would involve the angle of the camera and the distance and everything else. If the man has seen the ground and is giving an esti-

mate, that's one thing. If he is making it from the picture, that's another thing.

Q. Did you see the ground yesterday and observe it carefully?

A. Yes, sir.

Q. Are you making it from your own personal observation as well as the picture?

A. Yes, sir.

The Court: I didn't understand there was testimony that these towboats were in the same position. If there was, I didn't hear it.

Q. As to the mooring of those towboats, that is the stationary landing for the towboats, is it not, sir?

A. That's right.

Q. And when you navigated this stream here and came in with your towboat and your load of barges you went to this landing here with your towboat, did you not?

A. I was never in that landing.

[fol. 337] Q. You were never in that landing, but you have been by here?

A. I have been by here, yes, sir.

Q. Is that where the towboats are moored?

A. They lay there, the towboats lay there, and then they have a fleet of empty barges, I believe, below the bridge.

Mr. Love: Would you speak up, please?

A. I said they have the towboats there on the upper side of the bridge and below the bridge they have empty barges tied, I believe, in order to pull up here and load.

The Court: This whole thing, including the digger boat, is on the upper side of the bridge?

The Witness: The upper side, yes, sir.

Q. What do those ways consist of, Captain?

A. They consist of tracks extending out into the water which have cradles mounted on and are operated by winches on the hill to lower and raise the craft out of the water.

Q. Captain, as far as the position of the barge, you have testified as to the distance from the towboat. With the supposition that the vessel in question was moored here, which

was upstream from the digger, how far would you say from the ramp it would be to the ways?

Mr. Love: The question is from the digger to the ways?

[fol. 338] The Court: From the ramp to the ways.

A. By traveling the road?

Q. Yes.

A. The natural way of getting to and from the ways to the ramp?

Q. Yes.

A. I couldn't tell you exactly but my estimate would be at least 600 feet or more.

Q. Captain, whom do you work for?

A. I work for the law firm of Sampliner and Thompson.

Q. And how long have you worked for us?

A. Going on five years.

Q. And during that time you have sailed as master for us?

A. Yes, in 1953.

Q. And you are on salary and you get your expenses?

A. Yes, sir.

Q. And your salary runs every month, does it not?

A. Yes.

* * * * * * *

[fol. 339] The Court: Do you have any interest in this case?

The Witness: None, only to testify as an expert.

The Court: Does that mean that you are giving your services free?

The Witness: I am paid a salary for my services by Mr. Sampliner.

The Court: What are the services?

The Witness: My services consist of investigation of marine disasters, collision, casualties, and taking statements from witnesses and also, if needed, testify.

* * * * * * *

[fol. 340] Q. Now, how many times have you testified for our firm in court in the last five years?

A. Five times.

* * * * * * *

Q. Who else have you testified for?

A. I have testified for Mr. Jim McCardle, James McCardle.

Q. Who else, Captain?

A. I testified here in this court here, I think, about a year ago. Of course, that was for your firm but Mr. Vic Hanson and Mr. Pauley were handling the case here at that time.

Q. Have you done any other testifying in Pittsburgh?

A. Only for Mr. McCardle and Mr. Casteel on a collision [fol. 341] case, and Mr. McCardle's was an injury case.

Q. When you testified as an expert for Mr. Casteel was he representing a shipping concern?

A. No.

Q. Who did he represent?

A. He represented a seaman that was working for the Ohio Barge Line.

Q. Not Mr. McCardle, Mr. Casteel.

A. Mr. Casteel was representing the Smith Towing Company.

Q. And where do they ply out of?

A. Pittsburgh.

Q. Captain, in your opinion what determines whether a vessel is manned or unmanned?

* * * * * * *

The Court: The question is what in his opinion determines whether a vessel is manned or unmanned. I think before we get an opinion, though, we must find out whether he is basing it on the knowledge that he has gained as a master and a pilot.

[fol. 342] Is that right? Would that be the basis of your opinion?

The Witness: Yes, sir.

* * * * * * *

A. I would say that any time that a vessel consists of men operating, loading or unloading, and men are aboard for repair of any kind, that that vessel at that particular time is manned.

* * * * * * *

Mr. O'Farrell: Let me object on behalf of Amherst and move to strike the witness' last answer on the ground that

whether a vessel is manned or unmanned is not a matter of opinion but is a question of law, and that is the basis for Amherst's objection.

The Court: Overruled.

Mr. Love: And we would like to join in that.

[fol. 343] The Court: Overruled.

* * * * * * *

[fol. 348] Direct examination (Continued).

By Mr. Sampliner:

Q. Tell us your observation of sandblasting in any of these ways relative to any barges afloat. Have you observed it?

Mr. Love: Just one moment. Is this going in over our objection?

The Court: I think it is, yes.

Q. Go ahead. Answer it.

A. Well, I have noticed two different docks where they were sandblasting the deck of barges afloat.

Q. And where did you see this?

A. One of them was at Dravo, Neville Island, and the other was at J. and L. at Floreffe.

Q. Captain, can you describe what you have observed with your own eyes in these various yards or ways relative to sandblasting a barge afloat?

A. Well, I noticed that they had all the equipment necessary to sandblast the barge on the barge. They had their sandblasting machine there and the men were working and I also observed that they had a lifeline around the outer edge on both occasions of the barge.

Q. Now, I hand you this model for the purpose only of [fol. 349] illustration. Would you be able to kindly describe what you mean as the lifelines around the vessel and how they are fastened? Show his honor how they are fastened.

Mr. O'Farrell: Is it understood that this line of testimony all goes in over the objection of both defendants?

The Court: Proceed.

A. They are fastened by clamps. There is a ring that goes around the bitts and from that ring there is a stanchion that stands up the height of—oh, three feet, and through the top of it you either have a ring welded in it or it has a hole drilled through it.

That is also done on this bitt and on the kevels or bitts or whatever there is around it. It goes clear around the outer edge, the outboard edge, and then through these rings there is a line threaded through.

Q. Can you describe to his honor how they are fastened onto the saddle of the kevel?

A. Well, there is a clamp that comes down over the center of the kevel here and this clamp squeezes together. It comes in like that and then the bolt comes through up here and squeezes it together. It makes it substantial. It could be knocked over, but it would warn anyone touching that line that he was near the edge.

[fol. 350] Q. All right, and is that the purpose of the stanchion line?

A. Yes, sir.

Q. Did you see any other safety gear? Using that barge model, did you see any other safety gear on board as you observed the sandblasting operation?

A. Well, I noticed that all employees wore life jackets on these barges or belts, life belts.

Q. Did you observe any other equipment?

A. And there was ring buoys and in one particular case at Dravo we were laying right alongside, we come up and tied right along the side of their barge. We were on the motor vessel Victory at the time and we tied along the side of this tank barge that they were sandblasting.

Q. Is that similar to the barge in question here?

A. Yes, sir.

Q. Go ahead.

A. And I noticed on this barge that there was ring buoys forward and in the center and aft, and they also had lines attached to each of the ring buoys.

Q. Did you ever observe in your experience and as you were master of any vessel in navigating the inland waterways, did you ever notice any sandblasting where they used [fol. 351] the junk lines?

* * * * * * *

A. Well, a junk line is a piece of line that is too short to use in navigation of a barge and they use it just mostly around landings to lash the barges together, and may be twelve, fourteen, fifteen feet long, but it wouldn't be large enough or long enough to handle the barges out in the way or to move the barge, such as they do, so we call them on the river leaving lines.

It is a good piece of line. It would hold the barge or the weight of a barge, and what they do, they hang them over the side in a lot of instances where they are working on a barge. I never noticed them particularly on this one barge, the two barges that I saw, but I do know or have saw lines hanging from the bitts and kevels on barges that they were working on.

The Court: Do you know what the purpose is?

The Witness: It is the purpose if anyone falls in the [fol. 352] river they will have something to get hold of.

The Court: They reach down to the water?

The Witness: They reach down into the water, yes, sir.

The Court: All right.

Q. In your observation of the men working on these barges you have testified you have seen the sandblasting operation. Can you tell us the direction that the men work sandblasting? Do they go forward or do they go backward?

A. Well, at times they might take a step or two forward if they miss something, missed a little spot or something like that, but generally they are walking in a backward position, backward movement.

Q. Can you tell us from what you have observed with your own eyes as to the costume these men were wearing, what kind of headgear, if you can, and whether or not they were wearing the customary life jackets which are approved?

A. They were all wearing life jackets and the men that were doing the sandblasting had a hooded affair over his face that came down around his shoulders. Some of them were square and some of them were sort of oblong with a glass or plastic place to see.

Q. Have you ever observed any belts that any of the [fol. 353] welders would wear with the inflaters?

A. Well, I never noticed it particularly on welders but they used belts.

Q. Can you describe them for the court, please?

A. Well, it is a rubber like tube and it has a sort of like a vial with it that you pull the pin or something and instantly it inflates. I don't know just the mechanism of it or what causes it to, but I have saw the men wear them. They are about four inches wide and it goes right around the waist.

Q. This gear you have described and shown his honor here as far as the sandblasting operation on the barge carrying a liquid, can you tell us in your opinion as to safety gear, how long in your opinion would it take to install that equipment on a barge in time? How long in time would it take?

Mr. O'Farrell: I object, your honor, unless this witness can either testify that he has observed it installed or has installed it.

Mr. Love: I understand that all this is going in over our objection.

The Court: I think you have objected to nearly all the evidence about seaworthiness, but nevertheless I am letting it in—

Mr. Love: I understand.

[fol. 354] The Court: —unless there is a specific objection made to the man's competence to answer the question. I think he ought to show that he knows something about it before he answers.

Mr. Sampliner: All right.

A. I have installed such methods of safety lines around barges of our own. I was on the Ernest T. Weir. I was mate on the Ernest T. Weir and we had—well, it was open house on the boat. We had both boats, the Ernest T. Weir and the Albert E. Heekin were laid up at Pittsburgh City Wharf, and it was open to public inspection, both boats were, but they was a barge they came aboard, a barge first, and we installed the lifelines around these barges with a walkway coming up a ladder or a gangplank also with lifelines down to the end of it reaching out onto the wharf, and to place those lines around the barge a crew of five, I believe

it was—there was four deck hands and myself—it taken us about thirty or forty minutes at the most.

. . . . . .

[fol. 358] Q. Captain, in your experience would you have an opinion as to whether or not it is reasonable and practical for a vessel, CC-204, to carry her own safety equipment wherever she plies?

Mr. Love: We object, your honor.

The Court: Overruled.

Q. Go ahead. Answer it.

A. If the vessel is being loaded or unloaded and not in the tow or not a part of a towboat, such as it is when in tow, it is part of that vessel. That vessel carries the equipment for the boat and the barge safety equipment, so therefore if the barge is lying to and they were loading or unloading, there should be safety equipment on board that barge.

The Court: Let's see if I understand what you are now saying. You say that if a barge is being towed by a towboat [fol. 359] that you think it is not reasonable or practical to have the barge itself equipped with any safety devices?

The Witness: Other than if it is a tank barge it is required that it carry fire extinguishers.

The Court: I mean rescue equipment.

The Witness: Your rescue equipment is carried by the towboat itself.

The Court: Well, then, you do not think it is reasonable or practical for a barge of this kind in a tow, being towed by a towboat, to be equipped with rescue equipment?

The Witness: Well, it would be best if it were.

The Court: Well, then, what do you mean by your distinction between a barge that is laid to and a barge that is in a tow?

The Witness: Well, a barge that is laid to, it most always is a barge by itself. Therefore, there is no gear. The boat that was part of that barge at one time bringing it to the landing while it was in tow, it was part of that vessel bringing it there. It was classed as that vessel.

The Court: Well, then, do I understand that in that situation you do not think it is reasonable or practical that the individual barge be equipped with safety equipment—

The Witness: It should.

[fol. 360] The Court: —rescue equipment?

The Witness: It should, yes, sir.

The Court: Then why did you say a while ago that it didn't need to be because the equipment was on the towboat?

The Witness: That is while the barge is in transit.

The Court: That's what I am asking you now. While the barge is in transit do you say that it is not reasonable or practical that the individual barge be equipped with rescue equipment?

The Witness: If it is provided with a place to carry and store it, it should be on there at all times, but otherwise some of these barges don't have the storage space or they are not equipped with a storage locker or a place to carry this equipment where it can be gotten hold of at once.

The Court: Was CC-204 so equipped?

The Witness: From looking at the pictures, no, sir.

The Court: Then, with reference to CC-204 if it were a barge in transit would you say that it was reasonable and proper to have it equipped individually with rescue equipment or not?

The Witness: Well, I still think it would be a good idea to equip every barge with safety devices.

The Court: Is it customary to do it?

[fol. 361] The Witness: It is not customary, no, sir.

The Court: All right. Go ahead.

By Mr. Sampliner:

Q. Now, when this barge gets off by herself, in order to make the distinction for the court, is that the time in your opinion that the safety precautionary measures should be there?

Mr. Johnson: We object to the question as leading.

The Court: Well, I am going to overrule your objection. It is leading but go ahead and answer.

A. Yes, sir, it is.

Q. In order to make a further distinction, to be of assistance to the court, when the wires are out and the ratchets and the tow is all faced up and made complete, let's say this particular barge would be in the tow, the safety equipment is carried by the towboat, is it not, the pusher? Isn't that right?

A. Yes, sir.

Q. So therefore as she is out there she is a part of the whole, isn't she, of the whole vessel?

A. Of the whole vessel, yes, sir.

* * * * * * *

[fol. 362] Q. Now, can you tell us in order to explain this differentiation as to what happens to a vessel such as this barge when she becomes part of the tow and relative to the men working from the towboat on the unmanned barges—

A. When they pick up the barge up, you mean?

Q. Yes, and after she is in the tow.

A. When they pick the barge up she is securely fastened to the tow, the whole tow, and it is very stiff and rigid and fastened by means of wires and lashings and lines, and therefore it is all one piece. The boat is fastened to this tow in the same manner. It is all one piece and it is detachable one piece at a time, or the whole thing can be tied up as a whole, but it absolutely is part of the vessel.

The Court: Captain Applegate, that is not the point that the court wants to be enlightened on. That's merely a [fol. 363] technicality as to whether you denominate the barge and vessel as one unit. What we would like to know is what provision is made for the safety of the person who may be working out there at a distance from the towboat on one of those barges, which as they are put end to end make up several hundred feet.

The Witness: He receives his safety gear from the boat as he goes out there.

The Court: What does it consist of?

The Witness: It consists of a life jacket or a belt.

The Court: Is that all?

The Witness: That's all he takes with him at that time.

The Court: What do they do, if anything, about ropes and life rings and things of that nature?

The Witness: Well, they don't put that up on a moving tow. They never put up a life ring around a moving tow. There is one around the vessel hanging down from the upper deck or in stanchions along the guard around the vessel itself.

The Court: Then a life jacket or a life belt is the only additional rescue equipment that a man would have under those circumstances over and above what the man had on this CC-204 at the time of Mr. Goett's accident?

The Witness: That would be all that they would have [fol. 364] on, yes. sir, but there would be more lifesaving equipment aboard the vessel.

By Mr. Sampliner:

Q. When you say the vessel, you mean the towboat or the pusher?

A. The towboat.

Q. Can you tell his honor what other safety equipment they have on board these towboats?

A. They have a yawl.

Q. What is a yawl?

A. Well, I guess around here you call them a skiff or a rowboat.

Q. A large one?

A. A large one.

. . . . . .

A. They carry this yawl and they also have life rings at each end of the vessel and on both sides and they have one on each side of the pilot house with a line attached and a light also. I think they did away with the light. They [fol. 365] found out—

Mr. Love: Raise your voice.

A. Someone got burned with the lights. They automatically lit when they hit the water.

Q. Was that attached to a ring buoy?

A. It was attached to a ring buoy, yes, sir.

Q. Do they have all these ring buoys painted white?

A. They are painted white, yes, sir.

Q. When you made the statement that a barge should carry its own safety equipment if it had storage space, what did you mean by that?

A. If it had proper mounts to hang your ring buoys on. They shouldn't just lie loose on the deck because they would be kicked around and the first thing you know they will rot out from lying on the deck. There should be a holder provided to hang them up, from which they could be easily removed and cast into the water.

The Court: What expense or labor would be required to install a holder for a ring buoy?

The Witness: Well, I don't know. It would be made out of steel, probably two and a half inches wide and three-eighths of an inch thick. You could use an angle iron or you could use a pipe, put this in a circle around there with [fol. 366] hooks coming out, just hook the ring buoy in.

The Court: Is it a matter of days of work?

The Witness: No, sir.

The Court: Or minutes of work or hours?

The Witness: It is a matter of hours, it could be made and installed.

* * * * * * *

[fol. 373] Cross examination.

By Mr. Love:

Q. You don't work for any maritime company now?

A. Not at the present, no, sir.

Q. How long has it been since you have?

A. 1953.

Q. Well, back in 1953 were they using on the inland rivers, as to which you say you are certificated, barges of approximately the same size and capacity that were being used in 1955 and at the present time?

A. Well, the largest barge, the largest tank barge that I saw in 1953 was, I believe, 18,000 barrels, so I would judge—

Q. 18,000 what?

[fol. 374] A. Barrels.

Q. Barrels?

A. Yes.

Q. This has been described as 195 by 35 feet.

A. I would say that they was using barges of the same description at that tim as they do now.

Q. Is that size tank barge any larger or smaller than a coal barge?

A. It is larger, yes, sir.

Q. How many tank barges have you seen, Mr. Applegate, in a tow on any of the rivers on which you are certificated?

A. I have saw, I believe, as high as twenty in one tow.

Q. That would be in a double row, ten barges side by side?

A. It was three barges wide and, let's see, and six long and two back along the side of the boat. I believe that's the way they were arranged.

Q. Then there were six barges in front of the towboat that was doing the pushing, is that right, in one line?

A. Yes.

Q. Were they coal or oil barges?

A. They were oil barges.

Q. And they were approximately this same size?

[fol. 375] A. I think so. They belonged to the Ashland Oil and Refining Company.

Q. Well, then, if they were 195 feet long, the end of the farthest barge was over eleven hundred feet from the front of the towboat, wasn't it?

A. That's right, yes, sir.

Q. And over eleven hundred feet, almost twelve hundred feet from the edge of the pushing towboat?

A. You mean from the forward end of the pushing towboat?

Q. From the front end.

A. The bow?

Q. Yes, sir.

A. Yes, sir.

Q. You have seen more coal barges than that in a pushing tow, haven't you?

A. Yes, sir, I have.

Q. And how many did you ever see located?

A. I think I saw the Omar with thirty some barges at one time.

Q. And how many in a straight line in front of her?
A. She had five wide and six long.
Q. Six coal barges?
A. Yes, sir.
[fol. 376] Q. Do you know the length of those barges?
A. 175 feet.
Q. Then that was more than 8,000 feet from the front of that tow to the bow of the pushing towboat?
A. That's right, yes, sir.
Q. And what kind of decks do coal barges have?
A. They have a gunwale or walkway out each side and then they have a line deck on each end approximately twelve to fourteen feet fore and aft and the entire width of the barge, twenty-six feet.
Q. And the rest is simply a cargo hold?
A. Yes, sir.

Mr. Love: We have no further questions.

Cross examination.

By Mr. O'Farrell:

Q. Captain, you say that you did some work on the river in 1953?
A. Yes, sir.
Q. How long did you work in 1953 on the river?
A. I worked, I believe, in February—through the month of January, February and up in March, I believe it was, in 1953.
Q. And excluding those three months that you worked [fol. 377] in 1953 on the river, you have done no actual work on the river since 1950. Is that right?
A. No actual work.
Q. That is correct, is it?
A. That is correct, yes, sir.
Q. Excluding those three months, you have been employed by the firm of Sampliner and Sampliner since 1950?
A. Since 1952.
Q. Is that correct?
A. That's true. Correct, yes, sir.
Q. What kind of work did you do during those three months in 1953?

A. On the boats?

Q. Yes, what kind.

A. I was master and pilot of the Charles Zubik.

Q. On what river was that?

A. Monongahela, Allegheny, and Ohio.

Q. Have you actually ever seen the barge that is involved in this controversy?

A. I probably have. I never noticed it.

Q. Can you say that you have?

A. No, I couldn't say for sure that I have saw the barge. [fol. 378] Q. Did I understand you to say that you had seen two barges of this type—I mean by that the type involved in this controversy—that were being sandblasted?

A. Yes, sir.

Q. And where were they?

A. One was at Neville Island, Dravo Corporation Marine Ways, and the other was at Jones and Laughlin at Floreffe, Pennsylvania.

Q. Did I understand you to further say that those barges were both on the marine ways?

A. No, sir, you did not.

Q. They were both in the river?

A. They were both floating.

Q. I didn't hear the answer. They were both what?

Mr. Sampliner: Floating.

Q. When did you see those two barges, Captain?

A. I saw them either in '51, I believe, at Floreffe—I believe it was '51, either '50 or '51, and the Dravo Corporation, that was in 1942 when I was aboard the motor vessel Victory.

Q. So in the last twenty-five years you have seen two vessels of this type that were being sandblasted?

A. I have probably saw more but never paid no attention [fol. 379] to them.

Q. So far as you recall you have seen two vessels of this type in the last twenty-five years that were being sandblasted. Is that correct?

A. Not in the last twenty-five years.

Q. Last fifteen years? Last fifteen years?

A. Yes.

Q. That is correct?

A. That is correct.

Q. Did you actually ever engage in sandblasting a vessel yourself?

A. No, sir.

Q. Have you ever done any major repairs on a vessel such as painting a whole barge?

A. No, sir.

Q. Have you ever worked in a repair yard that engaged in repairing, painting, and otherwise looking after river-going vessels?

A. I have been aboard vessels that was in repair yards.

Q. I mean by that have you actually ever engaged in repair work in a repair yard?

A. On my own vessel, yes, sir.

Q. On your own vessel?

[fol. 380] A. The vessel that I was employed on, yes, sir.

Q. And you have never engaged in repairing other vessels other than the one that you were on?

A. No, sir.

Q. What kind of a vessel was it that you engaged in repairing?

A. A steamboat. It was the William Wiggam.

Q. When was that?

A. That was in 1951, I believe.

Q. And when did you say you started work on the river?

A. I started to work on the river in 1926.

Q. So since 1926 down to the present time you have engaged in repairing one boat on a river. Is that right?

A. I have engaged in repair work ever since I have started to work on the river.

Q. Didn't you say a moment ago when I asked you the question that you had engaged in repairing just the one boat that you named?

A. In the dock. You asked me, yes, sir, in the dock.

Q. And that's the only ~~one that was ever~~ in the dock that you engaged in repair work on?

A. Well, would you call painting repair?

Q. Repair by sandblasting.

[fol. 381] A. Well, I never have done any sandblasting but I did painting of boats when they would come in at the dock for inspection, whether they was pulled out on

the ways, and I have did painting, cleaning and painting of hulls numbers of times ever since I have started steamboating, too numerous to mention. I couldn't tell you how many times.

Q. How wide is the gunwale on a coal barge?

A. They vary in different widths.

Q. Well, approximately how wide?

A. The barges that they make today have a gunwale of about twenty to approximately twenty-four inches, something like that, I would say.

Q. And as I understand your evidence, while barges are in tow it is not customary for them to carry any kind of rescue equipment on the barge itself?

. . . . . .

[fol. 382] A. No, it doesn't. No.

Q. It isn't, is it?

A. No, sir, it isn't.

Q. And a man is in far greater danger of drowning when he falls off of a barge in a tow—

. . . . . .

[fol. 383] Q. —than he is when he falls off of the barge sitting, as the barge was in this controversy from which Mr. Goett fell?

. . . . . .

A. I understand the question. If a man fell over the head of the tow while moving, if he had on a hundred life jackets he would probably drown if he fell directly over the head of the tow, but if he fell off to the side of the tow, the wash of the break coupling or the coupling of the barges would shove him away from that boat; so if he had a life jacket on, he more than likely would stay afloat until they [fol. 384] could lower a yawl and go get him.

Q. Assuming that he had a life jacket on?

A. Yes, sir.

Q. If he didn't have a life jacket on, it would be far more dangerous to him to fall off a moving tow than fall off of a vessel moored as close to the bank as you understand this vessel was—

. . . . . .

Q. —at the time that Mr. Goett fell from it?

. . . . . .

A. At the time Mr. Goett fell from this barge I understood he was on the outboard outriver side towards the center of the river, was he not?

Q. That's correct.

A. In order for Mr. Goett to get ashore he would either have to swim upstream and around the head of that barge or swim downstream and go in under the stern of the barge to get ashore if he had nothing to hang onto.

If a man would fall off of a moving vessel the current [fol. 385] from the break of the barges would have the same effect on him whether he had a life jacket on or not. It would still throw him away from the barge, and also as he come back to the boat there is a break around the head of the boat where the water goes out from, would throw him away from it.

If he fell directly over the side of the vessel, the boat, and it was a screw wheel boat, as he went down below the bottom of the boat the suction of the propeller would pull him back through the propeller and he would be killed, drowned there, if he did not have a life jacket on; but if he was already in the water and was able to stay afloat by means of swimming he would not be in any more danger from a moving vessel than he would be from one lying still, if he was able to swim.

Q. If he could stay afloat?

A. If he could stay afloat, yes, sir.

. . . . . .

[fol. 396] Mr. Love: I would like to ask Mr. Huling to take the stand.

Reed F. Huling called as a witness on behalf of the Defendant Union Carbide and Carbon Corporation, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and please speak loud.

The Witness: Reed F. Huling.

Direct examination.

By Mr. Love:

Q. Will you give us your name, Mr. Huling?
A. Reed F. Huling.
Q. Where do you live?
A. Scot Depot, West Virginia.
[fol. 397] Q. That's in Putnam County?
A. Yes, sir.
Q. What do you do?
A. I am a supervisor at the South Charleston plant.
Q. Supervisor of what?
A. Department head of the process safety department of the South Charleston plant, Union Carbide Chemicals Company.
Q. That means processes within that plant, does it?
A. Within the confines of chemicals property in the State of West Virginia.
Q. Do you have an employe or does the company have an employe under you, whose superior you are, by the name of Rex Buckley?
A. Yes.
Q. Do you know Mr. Buckley?
A. Yes.
Q. Are you his direct superior?
A. Yes.
Q. Will you tell us whether Mr. Buckley in addition to his work for Carbide does any independent work?
A. Yes, he does.
Q. What is that work?
A. He is a certified gas chemist, certified by the American
[fol. 398] Bureau of Shipping.
Q. By the American Bureau of Shipping?
A. Yes, sir.
Q. Can you tell us whether on October 2nd, 1955, at which time it is shown in the evidence Mr. Buckley made a gas inspection of tank barge CC-204, whether he was working for Carbide or whether he was not?
A. He was not working for Carbide.
Q. I hand you the original certificate covering his work on that day and will ask you if you can identify that as Mr. Buckley's signature.

A. I believe that to be his signature.

Q. Can you tell us from your records for whom he was working on that day, if you know?

A. We have a record of his, Mr. Buckley's, that—

Q. I don't know that it would be proper for you to testify from his record. If you don't know for whom he was working—

A. We have a record that he did not work for Carbide that day.

* * * * * * *

[fol. 402] Cross examination.

Mr. Love: Excuse me. I neglected to ask Mr. Huling, or rather to show why Mr. Buckley is not here. Where is Mr. Buckley?

The Witness: He is in Seadrift, Texas, at one of the Carbide plants. He is on company business.

* * * * * * *

[fol. 411] Colloquy Between Court and Counsel

Mr. Love: Now, if your honor please, I would like to direct the attention of the court at this time to certain regulations of the Coast Guard.

* * * * * * *

Mr. Love: I can either do this by giving your honor a pamphlet and copies of those regulations which we understand have the force and effect of law, or I can give the citations in the record or I can read them into the record, as your honor may prefer, but I want to get them into the record at this time for your honor's convenience.

The Court: What is the objection?

Mr. Goldstein: The objection first of all is that the lawsuit is not and has never been based upon any violation of any Coast Guard regulation. This is based solely upon the general maritime law duty to provide a seaworthy vessel.

Under those circumstances any record of any violation or any record of nonviolation would not be admissible because it is entirely irrelevant to the case. The only ques-

tion that is relevant to the case is whether or not this [fol. 412] vessel is seaworthy. That is the first.

. . . . . .

[fol. 413] Mr. Love: Before I read them I would like to refer your honor to question number 19 of the plaintiff, which asks us the date of the United States Coast Guard or American Bureau of Shipping inspections of the vessel for five years, which we got for them. At that time apparently they thought these rules and regulations had somethin, to do with it.

I will first refer your honor to Rule 31.15-5, which appears on page 13 of the Coast Guard book. "Tank barges need not be manned unless in the judgment of the Officer in Charge, Marine Inspection, such manning is necessary [fol. 414] for the protection of life and property and for the safe operation of the vessel: Provided, however, That towing vessels, while towing barges which are not required to be manned, shall carry in the regular complement of the towing vessel and shall have on board at all times while towing, at least one licensed officer or certificated tankerman."

Definition of laid up or dismantled, on page 2 of the pamphlet, section 30.01-5(d)(2), that provides that any vessel that is laid up or dismantled is not required to meet any of the regulations, without reading them.

The same thing as to section 31.01-1.

On page 16 of the pamphlet, section 32.01-10, "All tank vessels, except unmanned tank barges, the construction or conversion of which is started on or after July 1, 1951, shall be fitted with fixed or portable rails on decks and bridges. All rails shall be in at least two courses, including the top, and shall be at least thirty-six inches high. Rails shall consist of solid or tubular sections or chains or wire rope or a combination thereof.

On page 47, section 33.40-5, "All tank barges regardless of size shall have at least two life buoys on board: Provided, however, That unmanned barges are exempt from this section."

[fol. 415] Page 63, section 34.40-5(d), "Each unmanned tank barge not provided with a cargo pump room shall be

equipped with at least one two and one-half gallon foam-type fire extinguisher or the equivalent, which may be carried aboard the barge or the towing vessel while under way."

Page 66, section 35.01-1, "Riveting, welding, burning or like fire-producing operations shall not be undertaken within or on the boundaries of bulk cargo spaces or in spaces adjacent thereto, until an inspection has been made to determine that such operations can be undertaken with safety."

It then describes how a gas chemist shall make such an inspection.

* * * * * * *

FREDERICK MARTIN recalled as a witness on behalf of the defendant Amherst Barge Company, having been previously duly sworn, was examined and testified further as follows:

Direct examination.

By Mr. Johnson:

Q. What is your name, sir?

A. Frederick Martin.

Q. You are the same Fred Martin who was previously sworn in this case?

A. That's correct.

Q. And you have twice previously testified in this case?

A. That's right.

Q. Mr. Martin, what experience have you had in dock and boat repair or barge repair operations?

[fol. 417] A. Practically the full time that I have been employed by the two companies.

Q. How long did you previously testify that you had been so employed?

A. It will be twenty-three years this June.

Q. When was the barge CC-204 delivered to the Amherst Barge Company?

A. That was delivered on Saturday.

Q. Do you recall what day that was?

A. I believe that's October the 1st.

Q. I believe you have already testified that there was a gas free inspection, that is, inspection made by Mr. Buckley on October 2nd, 1955. Is that correct?

A. That's correct.

Q. What was the purpose of that inspection?

A. That is for the gas free, fire safe, and safe for men to work.

. . . . . .

Q. It was safe for gas?

A. Safe for gas.

[fol. 418] Q. Safe for men to work so far as gas is concerned. Is that right?

A. That's right, sir.

Q. What was the result of that inspection?

A. It was proved to be safe. In other words, the certificate was issued so that we could proceed with work.

Mr. Johnson: That certificate, I believe, is already a part of the record in this case. Is that right, Mr. Love?

Q. When did you first go on board the CC-204 yourself?

A. It was on the 3rd, on Monday.

Q. I believe that you have already testified when you were on the stand before that there were no stanchion lines or railings around the outer decks of the barge. Is that correct?

A. That's correct.

Q. Was there anything unusual about that?

A. Not to my knowledge.

Q. Was it customary for such barges to be equipped with a rope or any other kind of a rail?

A. To my knowledge, no, sir, at that time.

Q. I believe you have already testified that there were no life rings or life buoys or similar equipment on board [fol. 419] the barge.

A. That's correct.

Q. Did you or Amherst employes remove any kind of safety or rescue equipment from the barge that was on it at the time it was delivered to you?

A. Not as far as rescue equipment, no, sir.

Q. Did you remove any kind of lifesaving or safety equipment from it?

A. Not in the—no, sir.

Q. Is it customary for such barges to be equipped with life rings or buoys?

A. Not to my knowledge.

Q. Was it the practice or custom of Amherst to put rings or buoys on barges that were brought to the yard for repair while afloat?

A. No, sir.

Q. Was it the practice of Amherst to erect a fence or a rail or to put a rope or line around the outer edge of the deck of such barges when they were delivered there for repairs while afloat?

A. No, sir.

Q. How long have you been engaged in supervising or directing the work of repairing floating barges for the [fol. 420] Amherst Barge Company and its predecessor company?

A. Since 1936.

Q. Prior to Mr. Goett's accident had anyone engaged in doing that repair work on floating barges fallen overboard so far as you know?

A. Not in the repairs of the barges, no, sir, to my knowledge.

Q. Since the time of Mr. Goett's death has any employe of the barge company engaged in doing repair work on barges while afloat fallen overboard?

A. Not to my knowledge. There is one incident—no, not to my knowledge on that, no, sir, not in the repairs.

Q. You referred to one incident and then you didn't go on with that. Would you tell us just what you had in mind, what you referred to?

A. What I had in mind was that we did have an old gentleman back before this company had taken over that had fallen between the barges but not in the river. In other words, he wasn't submerged in the water. He had fallen on some driftwood between the barges and was never submerged. In other words, the men were there to get him out.

Q. Did he lose his life?

A. No, sir.

[fol. 421] Q. And he did not fall in the water?

A. He was about half, I would say, submerged in the water to the waist.

The Court: What was he doing on the barge at the time?
The Witness: He was a pump boat or barge tender.
The Court: Fell off the side or the end?
The Witness: Walking the gunwale, yes, sir.

Q. What type of barge was that?
A. That was a steel barge.
Q. Was it a tank barge or a hopper barge?
A. That was a hopper barge.
Q. As I understand it, a hopper barge has only gunwales to walk fore and aft on instead of a flat deck like a tank car.
A. That's right.
Q. Mr. Martin, at the time of Mr. Goett's death did the Amherst Barge Company require men working on the barges to wear life jackets?
A. It wasn't required, but we did stress safety in a man, if he was afraid, that he had those for his benefit. In other words, they were furnished.
Q. State whether or not life jackets were available for anyone who wanted to use one.
[fol. 422] A. The life jackets were always available.
Q. Where were they available?
A. We had them on our steamboats, plus a sufficient number in the supply house, more than what employes we employed there in the operation.
Q. Do you know approximately how many were available in the supply house?
A. I would say in the neighborhood of ninety.
Q. State whether or not the supply house was kept open.
A. At all hours during the work time, yes, sir.
Q. Did the men have occasion to go there?
A. Several times a day.
Q. Do you know whether Mr. Goett had occasion to go there on the day of his accident?
A. Mr. Goett was there the morning of this accident because I was talking to him that morning.
Q. What would a man, an employe who worked on these barges, such as Mr. Goett, have to do in order to get a life jacket if he wanted one?
A. Ask is all.
Q. Where did he have to ask?

A. The supply department. They also have equipment. I may add that. In other words, any tool, any equipment [fol. 423] they wanted they could always get any type of material that way they wanted.

Q. Prior to Mr. Goett's accident were there any of the men who worked on the barges who did wear life jackets at any time?

A. There was one man in particular that wore one in working on the wheel of a boat.

Q. Were there any others?

A. No, sir, the others seemed to think they would be in the way of working.

Q. Did you or to your knowledge anyone on behalf of the company ever do anything to discourage employes from wearing life jackets if they wanted to?

A. Not at all.

Q. Prior to the time of Mr. Goett's death what was the attitude of the employes who worked on these barges with respect to wearing life jackets, if you know?

A. The attitude was that, in other words, you couldn't force them to wear them. It wasn't compulsory and most of them had been around the river most of their lives and wouldn't wear them.

Q. State whether or not there was opposition or resistance among the employes to working in life jackets prior to [fol. 424] that time.

A. Yes, there was quite a bit.

Q. Did you wear a life jacket yourself while you were working on the floating barges?

A. No, sir.

Q. Did you want to wear one?

A. I always felt that—in other words, I could do better without a jacket in working.

Q. Why did you feel that way?

A. Because they were bundlesome. Another thing was you didn't have the freedom to work and lots of times it would be detrimental to your working. In other words, it was in the way. Sometimes you might hook on something and cause you to go overboard.

Q. Mr. Martin, do you know of any situations in which in your judgment you would be worse off if you fell over-

board with a life jacket on than you would be if you fell overboard without one?

Mr. Pauley: If your honor please, we object to that.

Mr. Goldstein: Objection, sir. That question is too all inclusive. If Mr. Johnson will explain exactly what he means in the situation—.

[fol. 425] Mr. Johnson: I will make it more specific, Mr. Goldstein.

Q. Let me ask you this. If you or any other man working on this barge happened to fall overboard at the upstream end and there was any current, what would be more probable or what would be the most probable result?

Mr. Goldstein: Objection, sir, to that. He hasn't certainly shown that he is an expert on water currents or what might happen, and he may talk about it as far as he is concerned but the indjvidual man himself has something to do with what happens to him.

Mr. Johnson: I don't think he has to be an expert to answer that question, if he knows.

The Court: He has said, I believe, that nobody except Goett ever fell off, so I don't see how he could possibly know what would happen.

Mr. Johnson: Your honor, I believe he testified that no one except Goett had ever fallen from one of Amherst's barges while working on the barge. He may have knowledge of somebody else in other circumstances that fell in the river.

The Court: Other circumstances wouldn't be pertinent here.

Mr, Johnson: All right. I will withdraw the question. [fol. 426] Your honor, instead of withdrawing that question, if the court would indulge me I would like to ask for permission to have the witness vouch the record as to what his answer would have been.

The Court: All right. Go ahead.

Q. Do you remember the question, Mr. Martin?

A. Yes, sir In other words, wearing a life jacket in certain operations it would cause drowning more so than it would be lifesaving.

Q. Why is that so?

A. In falling under a barge you have no sense of direction. It holds you up under the barge and you would have no chance of getting away from the barge, which would cause friction against the bottom of the barge and it would cause more effort or use more strength to get out of it if you were able to get out from under it.

Mr. Goldstein: If your honor please, that entire answer was based upon an assumption that if a man would fall from a barge he would automatically fall under the barge.

Mr. Johnson: We were just vouching the record.

Mr. Goldstein: I would like to make my objection on the record.

[fol. 427] The Court: I sustained your objection but I permitted Mr. Johnson to have the question answered.

Mr. Goldstein: Thank you, sir.

Q. Mr. Martin, where were you when you first learned Mr. Goett was overboard?

A. I was working on the marine ways helping and giving instructions on the fabrication of a new steel cradle preparatory of pulling the CC-204.

Q. With reference to the marine railway which has been shown in some of the photographs that are in evidence and which is located along the shore just upstream of the location of the CC-204, I believe, as shown in those pictures, where were you at the time you learned of that accident?

A. I was at the upper side of number seven track.

Q. Is number seven the farthest track downstream in the marine railway?

A. No, sir, number eight is.

Q. And it is next to the farthest?

A. It is next to the far one.

Q. How did you first learn that Mr. Goett was overboard?

A. A man hollered "overboard" and, of course, I heard. I was near enough to hear that.

[fol. 428] Q. What did you do then?

A. I immediately ran to the digger boat, to the life ring, back along the side of the CC-204, and threw it into the river.

Q. How long did it take you from the time you first heard the shout or cry that told you that something was wrong until you arrived on the deck of the CC-204 at the point where Mr. Goett was in the water with the life ring?

A. I would say not over two minutes at the most.

Q. What did you do when you arrived there on the edge of the barge?

A. I immediately threw the life ring to Homer Schultz, which was in the water right below me.

Q. When you looked into the water when you arrived there on the edge of the deck, what did you see?

A. When I got the ring and started up the outside, which I considered the port side—I mean the starboard side, heading upstream, I ran along the outside edge looking over in the water to be able to locate the nearest man or the man that was in trouble, seeing an object in the water near Mr. Schultz and hearing one of the other boys say, "There he goes". That's all that I can remember on that.

Q. Did you actually see Mr. Goett in the water?

[fol. 429] A. I couldn't say for sure, no, sir. I saw an object in the water, but not knowing whether it was him or not.

Q. Who was in the water at that time?

A. There was three. Bob Riggall was one, Harold McCormick and Schultz.

Q. What was done in order to retrieve Mr. Goett from the water?

A. An immediate sound was put out, more so at the point of getting a yawl down from our other fleet, and putting in rescue efforts, which I immediately went to the supply house, summoned the Malden Fire Department, also the ambulance service with resculator. Also we put in operation immediately for our diver that we have, of putting him in the water to retrieve the body.

Q. Were you there when the body was retrieved?

A. I was, sir.

Q. How was he brought to the surface?

A. By a barbwire.

Q. And from what or from where was that manipulated, if you know?

A. That was over the side of the barge, sir.

Q. Was there during that effort any boat of any kind on hand?

[fol. 430] A. Yes, sir, there was a yawl approximately, I would say, 350 to 400 feet away.

Q. When did the yawl arrive at that spot?

A. The yawl was coming down the river when we were putting the diving equipment over into the calking flat at the center of our marine ways.

Q. How long from the time that you first arrived on the edge of the deck of CC-204 was it that the yawl arrived on the scene?

A. The yawl was on its way when I left. In other words, they were getting a wire in which we had grappling hooks and a barbwire, but the decision on the wire was the barb-wire was the best means of getting him out if the diving had failed. That is, the men in the water were so worn out that they were unable to go on down.

* * * * * * *

[fol. 432] Q. How long had Mr. Goett been working on the CC-204 prior to his death?

A. I believe he went on there the second day; in other words, to get his equipment over, and that was the day before. In other words, moving the sandblaster and all that equipment down on the boat, which took approximately a day's time to get it all up together there, we started the sandblasting the following morning.

Q. What date was it, then, that he first went on board?

A. I believe that was the 4th.

Q. And what time of day did he go to work on the barge on that date?

A. That I don't remember.

Q. Can you tell us whether it was in the morning or the afternoon?

[fol. 433] A. In other words, on the boat itself, I would say, with the boat itself intermittently; in other words, moving the supplies over the hill, he was engaged in the preparation for the duties that were to come the following day.

Q. Well, I mean doing any kind of work on the barge.

A. He was on and off the barge the day before.

Q. Do you know what time of day on the 4th he first went on board and began to do this work?

A. Prior to the day?

Q. On the 4t.

A. On the 4th, I couldn't tell you, sir.

Q. What time did he go to work on the barge on the 5th?

A. At 7:30. He went right to work after the whistle blew.

Q. Except for lunchtime was he on the barge continuously from 7:30 until the time of his death when he fell off?

A. On and off. He had made approximately three trips to the supply house and to the sand storage.

Q. Had he done repair work on other barges at this same mooring on any occasions prior to this barge?

A. He had done work on other barges, yes, sir.

Q. For how long a time?

A. Well, it would also be intermittently because we had [fol. 434] certain types of work that we would do on these barges. In other words, there wasn't any certain pattern for any set type of work to be done.

Q. Had he done work on repairing barges at this mooring intermittently, then, throughout his period of employment?

A. Over a period of time, yes, sir.

Q. What was the weather like on this day?

A. It was clear.

Q. What was the temperature, if you know?

A. I would say approximately eighty degrees, warm.

Mr. Johnson: I believe that's all. You may inquire.

Cross examination.

By Mr. Goldstein:

Q. Mr. Martin, to begin with, you stated that there was no requirement by Amherst for these men to wear life jackets. Is that correct?

A. There wasn't—in other words, they wouldn't wear them. They were there to wear them.

Q. Mr. Martin, please answer my question. Did you

state on direct examination that there was no requirement by Amherst Barge Company for these men to wear life jackets? Yes or no.

A. There was no requirement.

[fol. 435] Q. Thank you. But you stated that it was stressed that they should?

A. Yes, sir.

Q. Is that right? Can you tell me who stressed that?

A. I, for one, myself.

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Q. At what time did you stress the use of life jackets aboard these barges?

[fol. 436] A. It wasn't necessarily the barges. It was any place, mostly in wheels of boats and high water.

Q. Mostly in wheels of boats?

A. Yes. If you have ever worked on steamboat wheels, things that way, yes.

Q. Was that the purpose for the wearing of the life jackets?

A. Yes. In other words, if a man was afraid to go without one he could wear it. They were available to him.

Q. Did Mr. Goett ever work on a steamboat for your company?

A. Yes.

Q. Did you ever stress to him personally the use of life jackets?

A. No, sir, it was always a practice to carry that through our foremen.

Q. Through your foremen?

A. Yes, stress it to our other workers.

Q. Who were your foremen?

A. We have Jennings Johnson as one of the foremen.

Q. And did you stress to Mr. Johnson the fact that he should stress it to the rest of the men?

A. It is always a safety measure to stress everything [fol. 437] of importance that way to all the men in all the workings.

Q. And you considered the use of life jackets important. Is that correct?

A. If the man was afraid of the water.

Q. Will you answer my question? Did you consider the use of life jackets important to the safety of the men?

A. Not to me.

Q. Did you consider it important to the safety of the other employes of Amherst?

A. It was up to them whether they wanted to work with them.

The Court: The question is why did you stress their use if you didn't think it was important for them to be used?

The Witness: The thing was we could not force the men to use it.

The Court: But why did you stress their use if you did not think it was important that they be used?

The Witness: The thing was, we stressed it—I am a little mixed up. Would you mind repeating the question?

Mr. Goldstein: Miss, would you repeat the question?

The Court: The question I want to know, you said that you did not consider it important and yet you also said that you stressed the fact that they ought to use them. I [fol. 438] want to know why, if you didn't consider it important.

The Witness: That was considered if the man couldn't swim and the position that he worked in.

The Court: And you didn't stress it to everybody?

The Witness: Not to everybody, no, sir.

The Court: All right.

By Mr. Goldstein:

Q. Am I correct in saying you did not stress it to Mr. Schultz back there?

A. Mr. Schultz was a swimmer.

Q. And am I correct in saying you did not stress it to Mr. Goodwin back there?

A. I don't remember whether I did to him or not.

Q. And what about Mr. Hammons back there? Did you stress it to him?

A. Mr. Hammons is a swimmer.

Q. In other words, the only reason that you would possibly stress it is whether you decided or whether you were

informed or found out that a man could or could not swim. Is that correct?

A. If the man thought it wasn't—in other words, if he needed it, he had it.

Q. I am sorry. I did not hear you.

A. If a man needed it, if he thought within himself that [fol. 439] he needed it.

Q. It was the policy of the company to let the man come for it and tell you whether he needed it?

A. It isn't the policy of the company. The thing I am trying to get over, if the man thought he was in danger, rather than put a man in position to where it would endanger him, he had access to anything he wanted that way.

Q. That wasn't my question. My question was did you decide upon the importance of stressing this to each particular man on the basis of whether he could or could not swim?

A. No.

Q. What basis did you stress it on?

A. If the man thought he was—in other words, in a position. I never put a man anywhere that I wouldn't go myself and it would be up to the individual.

Q. Did you ever tell them that it was up to the individual? Is there a company policy for you to explain to the men that it is up to them to come to you and tell you whether it was provident for them to wear life jackets?

A. It was not a custom to wear them. In all of the works we ever had, it wasn't a custom.

Q. Mr. Martin, I want to find out who made the first overture, you or the men, in the use of life jackets.

[fol. 440] A. The company made it.

Q. The company made it?

A. Yes, sir.

Q. And how did the company go about that?

A. The company received them to wear them and the men wouldn't wear them because they couldn't get them so they would be comfortable enough.

Q. Didn't you just say to us that there was no requirement?

Mr. O'Farrell: Your honor, I think the witness is confused.

The Court: I think he is confused too, but I want him to get himself out of his confusion.

Mr. O'Farrell: The use of the word overture, I don't think he has the faintest idea—

The Court: He knows what the word requirement means.

The Witness: We didn't require a man to wear them.

The Court: You just said you did. You just said you required them to wear life jackets and they wouldn't do it. What do you mean by that?

The Witness: We were trying to get it across to get a jacket—in other words, we were working up to that point.

[fol. 441] The Court: Why did you think they needed a jacket?

The Witness: Well, our work was changing all the time.

The Court: Did you think that they needed jackets for their safety? You can answer that yes or no.

The Witness: I would say yes.

The Court: All right.

By Mr. Goldstein:

Q. Thinking that they needed jackets, did you do anything to enforce the use of those jackets by the men when they went on the barges?

A. There was an enforcement, trying—

Q. Please, Mr. Martin, answer yes or no. Did you do anything to enforce what you realized was a need for the men to wear life jackets?

A. I didn't at the time, no, sir.

Q. Did anybody else from Amherst Barge as far as you know?

A. As far as I know they had, yes, sir.

Q. Can you tell me the name of the person who did?

A. That was Mr. Charles Jones.

Q. Mr. Charles Jones?

A. Yes, sir.

[fol. 442] Q. And what position does he have with the company?

A. Vice-president.

Q. Do you know if Mr. Jones saw Mr. Goett the date of the accident?

A. No, Mr. Jones was in Europe.

Q. In Europe, and how long had he been in Europe?

A. Approximately, I would say, a month.

Q. And how much time actually did Mr. Jones spend with Amherst Barge in Reed, West Virginia?

A. Most of his time when he was there.

Q. When he was there, and how often was he there?

A. Almost every day.

Q. Except for the month before the accident. Is that correct?

A. Yes, sir.

Q. And was that the first time in your memory that he had not been in Reed, West Virginia?

A. No, he was in and out all the time.

Q. Was Mr. Jones—he was an officer of the corporation, but was he in a sense a man on the job or was he a man who stayed in the office?

A. Mr. Jones is on the job as much as he is in the office.

[fol. 443] Q. Is he on the barges?

A. Yes, sir.

Q. And he watches out for his men?

A. Along with all the rest of us, yes, sir.

Q. And I assume that he has been on barges through the years going back as far as Amherst was doing business?

A. That's right, as far as the Amherst people, yes, sir.

Q. And I think you testified in those periods of time before the accident the men never wore life jackets. Is that correct?

A. We tried to get them to.

Q. Answer yes or no.

A. No.

Q. And I assume when Mr. Jones went aboard those barges he saw the men didn't wear life jackets. Is that correct?

A. Yes.

Q. And I assume that Mr. Jones, realizing the need of the men, as you did, to wear life jackets, did nothing to enforce the rule and regulation?

Mr. Johnson: I object to that, your honor.

The Court: Sustained. He wouldn't know about that.

Q. In any event, you never enforced the rule and regulation?

[fol. 444] A. No, sir.

Q. And in any event the rule and regulation was never enforced. Is that correct?

A. No, sir.

Q. There is no question about that in your mind, is there?

A. No, sir.

Q. In the Coast Guard hearing that we have discussed, and I think you know the one I am referring to, you testified in answer to question thirty-five, and this is the question: "Is it not the policy of the Amherst Company to prepare or furnish any kind of safety equipment for any kind of unsafe or hazardous work? If so, what and for what?" and your answer was, "It has not been a policy of the company for men working on the barges on the ways to wear life jackets while working, although they do supply them for the boats." By "boats" you meant the river boats. Is that correct? You didn't mean barges.

A. Yes, sir. May I add one thing to that?

Q. No, sir. You mean—

The Court: He may make his explanation if he wants to.

A. There is no need for wearing them on the ways. The [fol. 445] ways were on dry land.

Q. But this barge was not?

A. That's right, it wasn't on the ways.

Q. The men were aboard this particular barge when it was afloat?

A. That's right.

Q. You say there was no need for the men to wear them while the barge was on the ways?

A. That's what my statement is based on, on the ways.

Q. On the ways?

A. That's right.

* * * * * * *

Q. But when you said that in your opinion life jackets are not needed while the barges are on the ways, did you refer to on the ways as distinguished from in the water?

A. That's the statement there. In other words, that's what he asked. That's the answer I gave him, they weren't [fol. 446] used on the ways.

Q. And you concur, then, in my statement that you did distinguish the need of safety jackets while the boats were on the ways as against while they were in the water?

A. No, my answer was only to that, as to his question.

Q. Well, do you make the distinction that I just mentioned?

A. The only thing is I was going by his question when I gave him that answer. That's all.

The Court: He said do you make the distinction now?

Q. Do you make the distinction now, at this time, as between the time when the barges are on the ways and when they are in the water?

A. There was no need when they were on the ways. There might be when they are afloat.

Q. What did you say? I didn't hear the last part.

A. The life jackets would be used when they are afloat.

Q. They should be used?

A. We are stressing that now, yes.

Q. Can you tell me why they weren't used on October 5, 1955?

The Court: I think he has already gone into that. He said they were not used because the men wouldn't use them. [fol. 447] The Witness: That's right.

Q. The men wouldn't use them, and as long as they didn't use them you didn't enforce the order?

A. I had nothing to back me up on the enforcement.

Q. And you simply let it lie. Is that right?

A. Yes, and I still don't have.

Q. You acquiesced in the condition. Is that so?

A. That's correct.

Q. Would you say it is a fair statement that the reason you acquiesced in the condition is because the men could do their work a little faster without the life jackets?

A. I wouldn't say they could do it any faster.

Q. Would you say they could do it without being hindered by the life jackets?

A. You mean the fastness or in their work?

Q. In their work or in fastness, one or the other or both.

The Court: I think the witness ought to understand whether you are inquiring about his purpose for not enforcing the wearing of life jackets or about the men's purpose in refusing to use them.

Mr. Goldstein: I believe he did so, your honor, that he did testify that the reason the men told him that they [fol. 448] would not wear the life jackets is that it hindered their work.

The Court: That's right.

Mr. Goldstein: I wish to find out just how it hindered their work to wear life jackets.

A. Did you ever try to?

Q. Will you please answer my question?

The Court: Don't ask questions. Just answer them.

A. I know. I am just trying to get it across.

Q. I know you are. Will you please answer my question?

A. Would you read that again?

Mr. Goldstein: Miss, will you read it back, please?

(The question was read as follows: "I wish to find out just how it hindered their work to wear life jackets.")

A. One was they are hot. That's one thing. They are bundlesome. You have no free movement of the arms, and in sanding—

Q. Go ahead.

A. In sanding or burning you can burn one up every time you put one on.

Q. That's sanding or burning? What do you mean by the word burning?

A. Burning is when you are cutting metal.

Q. Is sandblasting the cutting of metal?

[Fol. 449] A. It is a cutting of the surface of the metal.

Q. It is a cutting of the surface of the metal?

A. Cutting and cleaning the surface of the metal.

Q. And is it your testimony that those life jackets if worn would be detrimental to a person?

A. I would say it would be in the way to him in free movement.

Q. And what would that mean in the way of his own safety?

A. I would say it would be a hindrance to him in sandblasting for his own safety. In other words, he wouldn't have the proper balance or, in other words, maneuverability.

Q. So that you now tell us that those life jackets were detrimental to workers. Is that correct?

A. I beg your pardon? Come again.

Q. You now tell us that those life jackets were detrimental to workers. Is that correct?

A. I would say in the sense of the word where—if I was working with one I wouldn't want it.

Q. And you would feel it would be detrimental to your safety on the ship?

A. In my work, I would say.

Q. Naturally, in your work. If you were sandblasting [fol. 450] you would feel those life jackets would be detrimental to you?

A. Yes, sir.

Q. Detrimental to the effect that it might affect your health, it might burn?

A. Yes.

Q. And that might be enough reason for a man to refuse to wear them. Is that correct?

A. That would be one thing.

Q. And is that the only type of life jacket made available by Amherst Barge?

A. We have tried several types.

Q. And you feel there is no type in this wide, wide world that could give those men maximum safety with minimum detriment?

Mr. Johnson: Your honor, I don't think that is a proper question.

Mr. Goldstein: I think it is quite proper, sir.

The Court: It is a little broad. It should be the types that were reasonably available.

Mr. Goldstein: Thank you, sir.

Q. Now, you had one type of life jacket. Is that correct?

A. Yes.

[fol. 451] Q. You had one at the time of Goett's death?

A. Yes.

Q. And that life jacket you felt was detrimental, you personally felt was detrimental?

A. That's right. I am speaking for myself.

Q. Did you have any other type of life jacket available at that time?

A. We had a life ring but no other jacket.

Q. A life ring? What did that life ring consist of?

A. The life ring is made of cork which is thirty inches in diameter, consisting of a rope five foot long. It has a rope that is interlaced in the outer part of the canvas and which meets U. S. Coast Guard specifications.

Q. And that's not worn by workmen?

A. No, it can be.

Q. But it was not?

A. No.

Q. And you didn't enforce any rule or regulation for them to wear that?

A. No, sir.

Q. Forgetting for a moment about the life ring, knowing that these jackets were detrimental to the health of the men and knowing that they refused to wear them for that and [fol. 452] possible other reasons, what arrangements or what investigations did Amherst Barge make to obtain other life jackets that might be proved more suitable for the type of work Amherst Barge was engaged in?

A. You will notice in the contract agreement of September the 21st, 1955, the negotiations were to get a suitable life jacket that the men could wear.

Q. Am I to assume from that that it was realized by Amherst Barge that these were unsuitable?

A. Yes. In other words, we were getting one more suitable for the men.

Q. Now, then, is it a fair statement that there was no suitable life jacket in the control of Amherst Barge for these men to wear aboard barges?

A. In other words, we were testing, we were trying to get something that they could use and stand up under the same regulations.

Q. You were testing on the men on the barges?

A. No. We were, in other words, getting the fellows to wear them where they would be more comfortable.

Q. And how did you make this testing?
A. By buying different life jackets.
Q. And where did you test it?
[fol. 453] A. In other words, the men wore them.
Q. Where did you test it?
A. Sir?
Q. Where did you test it?
A. With the men.
Q. With the men during their working hours?
A. Yes.

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Q. During this testing period when you were trying out what later proved to be unsuitable equipment, what arrangements did you make for the safety of your men?
A. The life jacket itself was safe before it was put on the men. The only thing was we were trying to get something comfortable enough for the men to wear them. We weren't afraid of the life jackets themselves—I wouldn't have been—any of them that we have got.
Q. But you didn't wear them?
A. I could hav worn it.
Q. I am asking you whether you did.
[fol. 454] A. I didn't wear them, no.
Q. There was a good reason in your mind for not wearing them?
A. I could swim and I wouldn't wear it.
Q. You wouldn't wear it?
A. No.
Q. You considered it harmful to your health rather than helpful?
A. I wouldn't say it was harmful.
Q. Why didn't you wear it?
A. Because I didn't need it.

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Q. When you say that you first heard that Goett had fallen overboard, you heard the words "man overboard"?
A. That's right.
[fol. 455] Q. And you started running?
A. That's right.

Q. And by the time you reached the place where Marvin Goett was in the water it was too late to save him. Is that correct?

A. I wouldn't say that I wasn't up to that point. In other words, I did not know what it was going to take to save that man. I was getting every bit of equipment I could. In other words, I was trying to help those in the water.

Q. And your helping those in the water wasn't in time to save Marvin Goett. Is that correct?

A. That never entered my mind.

Q. What did enter your mind?

A. Getting the most help at the nearest time, that's to the boys that were in the water.

Q. And the nearest time that you got there was too late for Marvin Goett?

A. I couldn't tell you, only the fact of him being under the surface.

Q. He was under the surface when you arrived. Is that right?

A. Yes. I never did see him other than just an object in the water.

[fol. 456] Q. Isn't it your testimony that one of the men yelled, "There he goes"?

A. Yes, sir, and I was on the other end of the barge coming toward them running.

Q. You hadn't quite gotten to the place when, "There he went"?

A. That's right, "There he goes".

Q. You were too late to save him?

The Court: You have asked that two or three times, Mr. Goldstein.

Q. You were too late to throw him anything he could reach, he was under the surface of the water?

A. I only saw three men in the water.

Q. And you didn't see Goett?

A. As far as I could say seeing him, no.

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[fol. 458] The Court: You are not making any claim against the Amherst Barge Company and I think all of

this examination is improper. There has been no objection made, but it has nothing to do with the seaworthiness of the barge, and that's your only claim against the other defendant and not against Amherst.

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CHARLES T. JONES called as a witness on behalf of the defendant Amherst Barge Company, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and speak plain and loud.
The Witness: Charles T. Jones.

[fol. 459] Direct examination.

By Mr. Johnson:

Q. What is your name?
A. Charles T. Jones.
Q. Where do you live, Mr. Jones?
A. 1502 Hampton Road.
Q. What is your business or occupation?
A. I am employed by the Amherst Barge Company as a vice-president. I have been with the company since it was formed in December of 1949.
Q. What is the nature of your duties with the Amherst Barge Company?
A. To explain that, I am also employed by its parent and have been since October 1940. My duties are to coordinate the activities of Amherst Barge Company and Amherst Fuel Company.
Q. How old are you, Mr. Jones?
A. I am thirty-eight.
Q. Are you familiar with the operations of the Amherst Barge Company on and about October 5th, 1955?
A. Yes, sir.
Q. Before October 5th, 1955 and on that date did the Amherst Barge Company require its employes working [fol. 460] on barge repair work to wear life jackets?

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A. It wasn't the policy to force the men to wear life jackets.

Q. What was the company's policy at that time?

A. The company's policy was pretty well keyed to a contract which we had negotiated with District 50 of the United Mine Workers, which was effective on September 21st of 1955. In that contract there is a clause number twelve which indicates that it would be the joint responsibility of the union and the company to furnish jackets for these men.

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[fol. 461] Q. Mr. Jones, I will hand you this exhibit, which is the defendant number 2 exhibit number 1, and I will ask you to read that portion of the exhibit which you refer to.

A. "The Company shall furnish safety jackets to the employes on each towboat and the employes who work on the river at landing units, and employes in these [fol. 462] units must wear such jackets when they are out on barges and/or in hazardous places."

Q. What change, if any, in the company's policy with respect to the wearing of life jackets resulted from the adoption of this new contract?

A. We ordered a kapok type jacket shortly after the contract was effective in the hopes that we could provide a jacket that was a more acceptable jacket to the men.

Q. Did you have life jackets before the contract went into effect?

A. We have always had the approved type cork life jacket.

Q. You say approved type. Approved by whom?

A. Well, the Coast Guard up until recently only approved one type life jacket. That is, in my opinion and my understanding. The cork jacket has always been kept on our towboats and our landing boats and there was quite a number of them in the supply house. Those jackets have always been available since my connection with the company.

Q. Do you know approximately how many life jackets there were in the supply house on October 5th, 1955?

A. Approximately seventy jackets.

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[fol. 463] The Court: Do you dispute the fact that there were that many there?

Mr. Goldstein: I dispute the fact that he has any knowledge of this entire matter.

The Court: I am not talking about his knowledge. Do you dispute the fact that the life jackets were there?

Mr. Goldstein: No, not at all.

The Court: Then why are you objecting to this? Go ahead.

By Mr. Johnson:

Q. What was done, if anything, with respect to the company's supply of life jackets after the contract which you have testified about went into effect?

A. Well, we began ordering the kapok type jacket.

Q. Why did you do that?

A. Because it was the jacket that the various companies signatory to the contract had decided to buy. I am not [fol. 464] certain whether the first ones we got were fully approved because later we had to buy a kapok jacket with reflector light strips on it, and I don't know whether the first ones had those on them.

Q. What was the purpose of the strip that you refer to?

A. So that the jackets would show up when the men wore them on the tows at night and catch them in the arc lights.

Q. Did it have any other function or purpose?

A. As far as I know it didn't.

Q. Did it have anything to do with the buoyancy of the jacket?

A. It had no effect on the buoyancy.

Q. Did I understand you to say that this is also an approved type jacket?

A. I think it is approved for limited use. The cork type jacket is the kind furnished on all ocean liners and excursion boats and I believe they will stand up for emergency a considerable number of hours. I don't know that the kapok jacket is approved for extended emergency.

Q. Does the kapok jacket have any advantage over the cork type?

A. Yes, it is a much lighter jacket, easier to wear and generally much more comfortable type jacket.

[fol. 463] Q. What had been the attitude of the Amherst Barge Company employes towards working on barges while wearing life jackets before the change of policy that accompanied the adoption of the new contract?

A. The company had not required these men to wear jackets and they didn't wear them.

Q. Do you know whether they had any objections to wearing them?

A. Not actively directing the work on the ground, I couldn't cite a specific example of the objection. I can only cite from my own experience that they are a rather bulky and heavy jacket.

Q. What experience have you had with them yourself?

A. Well, I was in the Navy and I have been connected with this company since 1949.

Q. What is your own experience with them as to whether or not they interfere with your work?

A. The cork type jacket?

Q. That's right.

A. I would say it would be almost impossible to work with a cork type jacket.

Q. Have you also had experience with a kapok type jacket?

[fol. 466] A. The kapok type jacket is much more acceptable. It is still bulky and would hinder work but it is a much more serviceable jacket from the standpoint of work than the cork type jacket.

Q. Do I understand, then, that after the adoption of the new contract you changed the company policy with respect to wearing of life jackets by your employes?

A. Yes, it is the policy to urge everyone working for the company in and around the water to wear life jackets. We do not have the authority to discharge a man for failure to wear a jacket.

Q. How do you know that you do not have this authority?

A. This was thoroughly discussed when we negotiated the contract effective September 21st, 1955.

Q. Discussed with whom?

A. Mr. Charles Neal.

Q. Who is he?

A. He was then vice-president of District 17 and at that time we were transferred from District 17 to District 50. He was chairman of the negotiations.

Q. What was the outcome of those discussions?

A. Mr. Neal said that he would urge the officials of District 17 and District 50—it was a joint meeting to that [fol. 467] extent—to cooperate with the company to see that the men wore life jackets. It wouldn't be a point of discharge, but District 50 would make every effort to back the company up and see that these jackets were used.

Q. Did you specifically ask him if he or his union would back you up in the event you discharged a man for refusing or failing to wear a life jacket while working on a barge?

A. I did, and most of the conversation as to wearing life jackets was directed towards men working on tows and the principal reason for the insertion in the contract was to see that men working on the tows would wear them. I think that the coverage on the bank was an auxiliary coverage to that extent, but I specifically asked him that question.

Q. What was his answer to that specific question?

A. He said that he wouldn't be a party to an agreement whereby we would have the right to discharge for a violation of a company rule, of that type rule.

Q. Since that time what success or lack of success have you had in your efforts to get the men working on the barges to wear life jackets while at work?

A. We have had generally a favorable success. Most men carry these jackets with them. We haven't been one [fol. 468] hundred per cent successful. The men don't wear them while they are working. They have them most of the times in a reasonable proximity. We haven't been one hundred per cent successful and I don't suppose we will be.

Q. You say that they carried them with them. What do you mean by that?

A. The jacket is carried by one of the arm straps or shoulder straps and laid down beside the man at work. He lays it down himself.

Q. Instead of putting it on and wearing it as he is supposed to?

A. That's correct.

Q. Are you or have you been aware of any opposition or resistance from the men to working with these life jackets of the type that you are now using?

A. I wouldn't say that there was overt opposition. There is some negligence, which accounts for the fact that we don't get one hundred per cent of the men wearing life jackets.

Q. Are they hot and uncomfortable and disagreeable?

A. They are, quite, particularly in this kind of weather.

Q. Does that have anything to do with the fact that [fol. 469] they are not worn all the time by all the men?

A. I would say it would have a great deal to do with it.

* * * * * * *

[fol. 470] Mr. Johnson: At this time I would like to ask Mr. Goldstein and Mr. Sampliner if they will stipulate that [fol. 471] the Amherst Barge Company at the time of Mr. Goett's death was a subscriber to or had complied with the provisions of the Longshoremen's and Harbor Workers' Compensation Act and had provided through an insurance company the coverage which that act requires for its employes?

Mr. Goldstein: I will stipulate with one exception, that although they had proper coverage, I don't believe that they carried out their duties under the clauses of the act which stated that they had to inform the widow of any deceased worker of her rights under that act.

Mr. Johnson: That was no part of my stipulation so far as the stipulation goes.

Mr. Goldstein: You said not only were they covered but that they complied with. My understanding of the word complied with is that they did everything that they were supposed to do under that coverage and under that act. They did not comply with that part.

Mr. Johnson: Will you stipulate that they were covered by the Longshoremen's and Harbor Workers' Compensation Act and that they had provided through an insurance carrier the coverage which that act requires for their employes?

Mr. Goldstein: Yes, sir.

The Court: All right.

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[fol. 474]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
at Charleston

* * * * * * * *

Transcript of Proceedings—May 15, 1957

Tried before Honorable Ben Moore, United States District Judge, on the 15th day of May, 1957.

* * * * * * * *

[fol. 476] Third Day

The trial was resumed pursuant to adjournment on yesterday, there being present the same parties as heretofore noted.

CHARLES T. JONES resumed the stand, having been previously duly sworn, was examined and testified further as follows:

The Court: Are you through with your direct examination?

Mr. O'Farrell: Yes, your honor, we are.

The Court: Go ahead, gentlemen.

Cross examination.

By Mr. Pauley:

Q. You are Mr. Charles T. Jones, are you?

A. Yes, sir.

Q. The same gentleman who was on the stand yesterday?

A. Yes, sir.

Q. Mr. Jones, I hand you the Defendant Number 2's Exhibit Number 1. That is the agreement between the United Marine Workers, Division of District 50, and Amherst Barge Company. You recall that agreement, don't you?

A. Yes, sir.

The Court: It is United Mine Workers, isn't it? You [fol. 477] called it Marine Workers.

Mr. Pauley: It is Marine Workers. It says United Marine Workers, Division of District 50, United Mine Workers. Thank you, sir.

Q. Mr. Jones, did you have a contract with the United Marine Workers, Division 50 of the United Mine Workers, before September 21st, 1955?

A. No, sir.

Q. There was no outstanding agreement prior to that time. Is that correct?

A. With District 50.

Q. Did you have an agreement with any union that represented the employes of Amherst Barge Company before September the 21st, 1955?

A. District 17 of the United Mine Workers of America.

Q. And then your employes' union was transferred to the jurisdiction of District 50, is that correct, of the United Mine Workers?

A. As of September 21st.

Q. Did that contract prior to September 21st, 1955, have any safety provisions in it, if you recall?

A. I do not recall them specifically.

Q. Now, this contract that has been introduced as [fol. 478] Defendant Number 2's Exhibit Number 1, it was agreed upon on September 21st, 1955. Is that correct?

A. That was the effective date. It was the culmination of agreements arrived at prior to that date.

Q. And Mr. Goett's death took place on October 5th, 1955, some fourteen or fifteen days later. Is that correct?

A. Yes, sir.

Q. Do you know when the printed copy of the contract was delivered to the individual employes of your union?

A. No, sir, I do not.

Q. Was a copy of the contract posted on the bulletin board or made available to the employes, if you know?

A. I do not know that it was posted on the bulletin board. I assume it was made available when the contract was ratified.

Q. This contract says that the company shall furnish safety jackets—that's on page 12, Article XII—to the employes on each towboat and the employes who work on the river at landing units. What is a landing unit, Mr. Jones?

A. In the accepted sense, I assume the landing unit is any place where barges are moored.

. . . . . .

[fol. 479] Q. Now, Mr. Jones, you have heard the testimony here and you know where barge CC-204 was located, do you not, at that time?

A. Yes, sir.

Q. Did this contract in your opinion cover the men working on that barge?

A. The men working on that barge were covered by the agreement effective September 21st, 1955.

Q. Mr. Goett belonged to what you called the repair gang. Isn't that correct?

A. Well, Mr. Goett was classified, I suppose, at that time as a sandblaster.

Q. In other words, they did the repairs on the vessels that were brought into your port for repair. Is that correct?

A. Mr. Goett and the other men did that work, yes, sir.

[fol. 480] Q. I believe you heard Mr. Martin's testimony yesterday and he said you had no definite policy towards these men with reference to requiring them to wear life jackets. Isn't that correct?

A. Prior to September 21st, that is correct.

Q. Did you have any definite policy after September 21st towards these men with reference to giving them instructions to wear life jackets?

A. The policy was to urge men to wear life jackets.

Q. Well, did you actually urge them to wear life jackets?

A. We ordered jackets after the contract was signed.

Q. But did you order the men to wear life jackets after that time?

A. Yes.

Q. Did you personally order them yourself or did Mr. Martin do it?

A. The men—I want to explain that order. As I testified yesterday, we cannot discharge a man for failure to wear a life jacket. The men were ordered in the sense that they were urged to wear life jackets and we purchased life jackets for that use.

Q. Yes, but when did you urge them and how? Was it verbally or by written notice on the bulletin board, or [fol. 481] how did you urge them to wear life jackets after September 21st, 1955?

A. It was carried out through our organization.

Q. Well, who, specifically?

A. Well, the normal chain of command.

Q. Well, sir, who is in that chain of command, Mr. Jones?

A. We have several departments. Mr. Martin has one.

Q. Mr. Martin said he didn't do it, didn't he?

Mr. Johnson: Your honor, I object. I think he is simply arguing with the witness as to what another witness testified. That's not the question.

The Court: It is not proper to ask one witness about what another witness said, but, of course, you can go right ahead and probe as to how the orders were given to wear the jackets.

Mr. Pauley: Yes, sir.

Q. Who besides Mr. Martin did you direct to instruct the men to wear safety jackets?

A. The order or the urging to wear safety jackets arose from the signing of the contract.

Q. I didn't quite hear that, sir.

A. The order or the urging, whichever you may interpret it, arose from the signing of the contract September 21st. No directive could have been given to the men

[fol. 482] to wear these jackets prior to the date that they could be furnished.

Q. When were you able to furnish the safety jackets?

A. Sometime in the early part of October.

Q. Was it before or after the death of Mr. Goett?

A. The first order was placed on September 29th.

. . . . . .

The Court: As I said yesterday, I think it is largely foreign to the issue of seaworthiness, but it has been gone into at length by counsel for Amherst and I think then the cross-examination is proper, and the court will later rule as to what the material evidence is on the issues before the court.

. . . . . .

By Mr. Pauley:

Q. And the life jackets were not available until after Mr. Goett's death. Is that correct?

A. I can't answer that.

Q. You say, Mr. Jones, you don't know whether they were available or not on the date of Mr. Goett's death?

A. Yes, sir.

Q. Isn't it a fact, Mr. Jones, that none of the men work-[fol. 483] ing on this barge were wearing life jackets on the date of his death?

A. That's been the testimony.

. . . . . .

[fol. 485] Q. I believe you said yesterday that you had a discussion with a Mr. Neal of the mine workers organization, did you not, relative to the enforcement of the safety regulation requiring the men to wear safety jackets?

A. Yes, sir.

Q. And what was it you said he told you?

A. Mr. Neal told me that he wouldn't be a party, or words to that effect—

Q. Just a minute. Excuse me, sir. I can't hear. All right, go ahead.

A. He told me that he wouldn't be a party, or words to that effect, to a mechanism to discharge a united mine worker, but he would urge the officials of District 50 who were then coming into this agreement to cooperate with the company and make every effort to urge the men to wear these life jackets. Our conversation, as I testified yesterday, was primarily directed to getting men to wear jackets on tows.

[fol. 486] Q. On tows?

A. That is the principal reason the discussion came up, but in the agreement it was written as you see it.

Q. In other words, your discussion with him did not pertain to these repairmen necessarily?

A. It pertained to everybody covered by the contract. However, our principal men we discussed were men working on tows.

* * * * * * * *

Q. Well, did you make any attempt after the 21st of September, 1955, with the officials of the union to ask the men to comply with the regulations requiring safety jackets?

* * * * * * * *

A. I did not personally.

Q. Did anyone in the company do so?

A. I do not know.

Q. Didn't you testify yesterday that some time prior to this agreement you were experimenting with safety jackets?

A. No, sir, I don't think I testified to that.

[fol. 487] Q. Well, were you, or do you know that your company was experimenting with safety jackets at that time?

A. You say at that time? What period do you mean?

Q. Well, I say prior to September 21st, 1955, and during the period September 21st, 1955 through October 5, 1955.

A. In 1951 we purchased a kapok jacket which was in addition to the accredited cork type life jacket carried on one of our harbor boats.

We purchased this jacket in our endeavor to find a jacket which would be comfortable for the men to wear while at

work. As I remember, we purchased three types of jackets. I specifically know of the date of one. It was all in the same period. The experimentation was not to test the jackets for survival. It was only to test them for their wearing qualities and the comfort of the men while they worked.

Q. I believe you testified yesterday that the jackets you had on hand at the time were impractical as far as being able to use them while the men were performing their work. Is that correct?

A. You are now referring to the cork type Coast Guard approved jackets?

Q. The jackets that you claimed were available for the men. Is that right?

[fol. 488] A. The jackets that were available, the cork type jacket, I did testify that that is a bulky and difficult jacket to wear while working.

Q. But didn't you testify yesterday, Mr. Jones, that the jackets you had available were almost impossible to wear when working at the same time, that you yourself found that to be true?

A. I may have used the word impossible. They were a difficult jacket to wear while working.

* * * * * * *

Q. Mr. Jones, in furnishing life jackets to men who are to perform work in the yards, do you feel that it is your duty to provide a jacket that they can work in practically?

A. It is our duty to provide an approved type jacket [fol. 489] which is comfortable for the men to work in. You must realize that we have to buy an approved type of jacket.

Mr. Pauley: Yes, sir, that's all.

Redirect examination.

By Mr. Johnson:

Q. Mr. Jones, have you ever seen, have you ever found or have you ever had demonstrated to you to this day any type of life jacket which is comfortable for a man to work in?

A. In my experience I have never known a jacket which is comfortable for active working conditions.

Q. There has been some mention here in the record of a type of safety device known as a life belt. Are you familiar with that?

A. Only through my experience in the Navy.

Q. And what was your experience in the Navy with that type of belt?

A. At the time I wore that belt in the Navy I was in the Seabees. I did all kinds of construction work. I have done welding with that type belt.

Q. And what observations did you make as to the practicality of the use of that type of belt in connection with the kind of work that is done on these barges at Amherst?

A. My difficulty was with that type belt it has the in-
[fol. 490] flatable cartridge that is in the belt. I continually inflated it. If you kept the cartridge out of the belt you didn't have that trouble, but if you went overboard when the cartridge was out of it, you would be in pretty bad shape.

Q. You say the cartridges continually inflated the belt while you were at work? Would you explain how that happened?

A. The belt was triggered to inflate the cartridge by a sharp needle being thrust through a babbited seal. On any pressure in the vicinity of the cylinder it would inflate.

Q. When you moved and bent over in the course of your work, did that exert pressure and cause it to inflate?

A. In my experience it did.

Q. Do you think that type of belt is practical for the type of work these men do on these barges?

A. In my opinion it is not.

Q. You did have a union contract with a different labor organization prior to September 21st, 1955. Is that your testimony?

A. Yes, sir. It was District 17.

Q. Was there any requirement in that contract with respect to wearing life jackets while at work on barges?

A. If there was, I am not familiar with it.

Q. I believe Mr. Pauley asked you if you knew when the [fol. 491] printed contract of September 21st was distrib-

uted. You said that you did not. Do you know whether or not that contract was printed and distributed before or after October 5th, 1955?

A. My answer was that I did not because I do not know the date. My estimate would be that it would probably be ninety days after the signing of the agreement before the printed copy was distributed.

Q. Do you actually recall the approximate time interval before the printed contract was distributed?

A. It was some months, because we had never received an agreement printed in this manner before, and a check of our records doesn't give us any help as it was delivered by courier, but in my opinion it was probably ninety days.

Q. Now, in order that there will be no confusion or doubt about your testimony, I want to ask you this. Did the Amherst Barge Company have on hand available to its employes before September 21st, 1955, life jackets for the use of the men working on these barges?

A. Yes, sir, we had them in the supply house and on our boats.

Q. And what type of life jackets were those?

A. It was the approved, Coast Guard approved type cork life jacket.

[fol. 492] Q. When you speak in your testimony of efforts to obtain a more suitable type of jacket after September 21st, 1955, what are you referring to?

A. Well, in my testimony yesterday I said that it seemed to me as though some of the jackets we purchased did not have the scotch light strips on them, reflector light strips, and that we had to purchase other jackets to replace these because the reflector light jacket was much more applicable for men working on tows at night because the reflector light strips showed up in the lights of the boat.

Q. Are the reflector light jackets that you referred to as having been obtained after September 21st cork type jackets or kapok type jackets?

A. Kapok type jackets.

Mr. Johnson: That's all.

Recross examination.

By Mr. Pauley:

Q. Mr. Jones, you had the original copy of this contract in your office, didn't you, on September 21st, 1955?

A. I suppose it was. I was not in my office.

Q. Mr. Jones, knowing that the men were not wearing the life jackets because they were uncomfortable and there was no particular policy towards enforcing them to wear [fol. 493] them, don't you think that under the circumstances these men were working under that you should have installed life rings and throw lines or stanchion lines around that barge?

Mr. Johnson: I object, your honor.

The Court: Sustained.

Q. Mr. Jones, what else did you do to protect these men, knowing that they didn't wear life jackets—

* * * * * * *

Q.—while working on the barge?

* * * * * * *

A. We had ordered life jackets as soon as it was practicable.

* * * * * * *

Q. Did you do anything else?

A. The testimony indicates there was nothing else on the barge. I am answering your question as well as I can. We [fol. 494] ordered life jackets on the 29th. The contract was signed on the 21st. It took us some little time to find who to order them from and what life jackets would be acceptable, and that was the earliest we could get the order in.

The Court: Mr. Pauley is asking whether anything else was done besides ordering life jackets.

The Witness: No, sir, not to my knowledge.

* * * * * * *

Mr. O'Farrell: Now, your honor, yesterday when I asked counsel for the plaintiff to stipulate that Amherst was a subscriber to the Longshoremen's and Harbor Workers' Compensation Act and to stipulate that there was an insurance carrier who carried Amherst's obligations, counsel for the plaintiff stipulated that but stated in open court that Amherst did not advise the widow of her benefits, and that it was Amherst's duty.

I have now the file of Amherst and I will state to the court and as counsel for the plaintiff to admit it in order to shorten this matter that the employer, Amherst, first of all reported this accident to the West Virginia State Compensation Commission two days after the accident hap-
[fol. 495] pened, on the assumption that it was covered by the West Virginia State Compensation Department, that a few days later Mr. Cyr of the United States Department of Labor advised or asked Amherst Barge about this accident, that correspondence then ensued between Mr. Cyr and the compensation department and Amherst, and as a result of that correspondence that on December 1st, 1955, that this accident was reported to the United States Department of Labor, acting by and through Albert J. Cyr, Deputy Commissioner, as a compensable case under the Longshoremen's and Harbor Workers' Compensation Act, and that it was the assumption of the employer that from that point on the U. S. Department of Labor would see that the widow and children of the decedent were advised by Amherst's insurance carrier that Amherst's insurance carrier stood ready to make these payments provided by the act.

I assume counsel will admit that. If they don't, here is the file, let them read it.

The Court: What you have said does not necessarily refute what Mr. Goldstein said. His statement was under the act it was the duty of Amherst to notify the widow and that Amherst did not notify the widow.

Mr. O'Farrell: I am simply offering this to show that Amherst so far as I can determine discharged its duty, and if there was any notification to be done, that the United
[fol. 496] States Department of Labor was to take care of

it. It was reported as a compensable case, and from there on it was theirs.

The Court: That is a matter of opinion as to what the act requires.

Mr. O'Farrell: I am offering this to sustain our position that we discharged our duty.

Mr. Goldstein: That's all it is, sir. That's all that is involved here. Obviously Amherst never did notify Mrs. Goett. They took it for granted that the government would do it for them. Nothing more I think needs to be said on that.

Mr. O'Farrell: And I want Mr. Pauley to admit that in December, 1955, that as counsel for the plaintiff in this action and her children he was advised by Amherst's insurance carrier that Amherst's insurance carrier stood ready to make these payments under the act. Is that correct, Mr. Pauley?

Mr. Pauley: That is correct and, your honor, I think Mr. O'Farrell will admit that the only notice that Mrs. Goett received from the company was a letter with some West Virginia Workman's Compensation funds.

Mr. O'Farrell: The point I want to make, your honor, is that we were willing, ready and able from the beginning as soon as it was determined whether the insurance carrier or what compensation department should cover this risk [fol. 497] to see that this widow and these children were paid their compensation. I don't want your honor to have any misunderstanding about that.

Mr. Goldstein: Your honor, may I only say that the entire thing is completely immaterial. There is no claim under the compensation act. Mrs. Goett has decided to pursue her remedy against third parties. I think this entire conversation was unneeded.

* * * * * * *

Mr. Goldstein: If your honor please, I have one rebuttal witness. Captain Applegate, will you take the stand, please?

ALVA FULTZ APPLEGATE recalled as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows:

Direct examination.

By Mr. Goldstein:

Q. Captain, I show you this book and ask you to identify it. First may I have the title, please?

A. "Towboat River."

Q. And who is the author or authors?

A. Edwin and Louise Rosskam.

. . . . . .

[fol. 498] Q. Captain, who published that book?

A. I would think it would be Duell, Sloan and Pearce, Incorporated.

Q. And can you tell me the year of publication?

A. Copyright 1948, by Edwin and Louise Rosskam.

Q. Captain, was the first time you ever saw this book earlier this morning?

A. Yes, sir.

Q. And who gave you the book to look at for the first time?

A. You did, sir.

Q. Now, Captain, you notice that there are a number of white slips at specific pages of the book, do you not?

A. Yes, sir.

Q. Will you kindly turn to the first white slip that you come to? Turn to that page, sir. On the left page what do you see? Will you explain that picture?

Mr. Johnson: Your honor, I object.

[fol. 499] The Court: Sustained. If you want to introduce the book, offer it and it will show what is in it, if it is admissible.

Mr. Goldstein: May I offer this book in evidence?

The Court: What is it?

Mr. Goldstein: It is a book of pictures of, among other things, towboats and barges, both manned and unmanned, used in the rivers I would assume throughout the United States, and they are pictures which have on them unmanned barges while in transit life rings attached to the decks of

those barges, and I would like to offer this in rebuttal evidence to show safe practice among certain companies. Is there any objection?

Mr. Love: If your honor please, we object. Union Carbide objects. We never heard of the book. Nobody offered anything to show that this book was of any authority whatsoever. A man who has been offered here prior to this time said he never heard of the book until this morning. How it could be offered as having any probative value we fail to see.

Mr. O'Farrell: Amherst joins in the objection, your honor.

The Court: As I understand, it is not a question of any authoritative value of the book, but the point is that there are photographs in the book which show barges in transit [fol. 500] and which show that these barges are equipped with safety rings. Insofar as that is shown it would seem to me that it would be prima facie proof that barges were equipped with safety rings.

Mr. Love: Those barges in those pictures.

Mr. Goldstein: That's all I intend to prove, sir, the custom as shown by these barges, nothing more.

The Court: This, of course, shows no universal custom, but it shows whatever it shows.

Mr. Johnson: Your honor, I submit that it would have no relevancy at all unless it were possible to know what the barges were, where they were at the time the pictures were taken, what use they were being put to, and all the circumstances that surround it.

For all we can know from simply looking at the pictures the situation pertaining to those barges and the circumstances surrounding them are entirely different from anything involved in this case.

The Court: Well, that may weaken their probative weight, but nevertheless I don't think that weakens their admissibility.

Mr. Johnson: Your honor, is Mr. Goldstein prepared to testify as to where these barges were, what their use was, what river or stream or ocean they were on, or anything about the circumstances?

[fol. 501] The Court: I don't think Mr. Goldstein is going to testify at all. If he did, I wouldn't let him.

Mr. Johnson: I should say Mr. Goldstein's witness.

Mr. Goldstein: I think my witness will testify to all the information he knows about those pictures when he is shown the pictures, and I think it is up to your honor to decide what weight his testimony shall be given, nothing more, nothing less.

The Court: If the witness can recognize the type of barge, if he can recognize the spot in the river or the particular river, I think he should be permitted to testify. Otherwise the book will be admitted, that is, the photographs will be admitted for such weight as they may have independently.

Mr. Goldstein: Thank you, sir.

Mr. Love: May we see where the record stands, if your honor please, what the last question is?

The Court: The last thing is the offer of this book in evidence.

Mr. Love: And our objection.

The Court: Your objection, and I admit the book insofar as it relates to these photographs, and I think counsel should state on what pages the photographs are so that I can determine just what is admitted in evidence.

[fol. 502] Mr. O'Farrell: It is understood Amherst also objects to the introduction.

. . . . . .

[fol. 503] Q. Now, Captain, will you kindly turn to the first page in which there is a white slip? That page, as you will note, has been marked in pencil 15-A. Can you tell us what that picture represents?

Mr. Love: We object for the additional reasons that the witness has not testified he was present when the picture was taken or knows in which direction it was taken or what kind of camera with which it was taken or by whom it was taken or when it was taken and when it was developed and whether or not it was reduced, increased or distorted, and for the other reasons assigned.

Mr. O'Farrell: Amherst joins in the objection.

[fol. 504] The Court: I think these objections are frivolous. They are overruled.

. . . . . .

A. This picture shows a tank barge with the cargo in the hold and also aboveboard in tanks. There are pipelines, hoses, wires, lines, chains and a ring buoy.

Q. Captain, is this a manned or an unmanned barge?

Mr. Love: We object, your honor.

The Court: I will sustain that objection, but if you want it for the record you may have his answer.

Mr. Goldstein: Yes, please.

A. I would say at the present time this is an unmanned barge.

Q. How can you tell it is unmanned?

A. There is no housing that I can see.

Q. Can you tell me who this barge is owned by from the picture?

A. From the picture I would say that it is owned by Standard Oil Company.

Q. Thank you, sir. Will you now turn to the page of the second white slip? You will note that it is marked on the bottom of the page 15-B. Can you tell us, if you know, what that picture represents?

[fol. 505] A. It represents barges either being loaded or unloaded at a dock.

Q. Is this barge a manned or an unmanned barge?

Mr. Love: Same objection.

The Court: I will sustain objection but permit the answer to be made for the record.

Q. Are there any men aboard that barge as far as you can see?

A. As far as I can see, no.

Q. Is there any housing on that barge as far as you can see?

A. As far as I see, no.

Q. From your experience would there be any place aboard that barge for a man to be while that barge was in transit?

The Court: I don't understand what you mean, for any man to be.

Mr. Goldstein: To stand watch while the vessel was in transit.

A. You mean living quarters?

Q. That's right, sir.

A. No, there is none that I can see.

Q. Can you tell us from the picture who you believe owns this barge?

[fol. 506] A. I would say Standard Oil Company.

Q. And are there any life rings aboard that vessel?

A. Yes, sir, there is.

* * * * * * *

Q. Captain, will you now turn to the page with the next white slip? Now, you will note at the bottom of that page it is marked in pencil 15-C. Captain, will you tell us what that picture represents?

A. That picture represents a motor vessel. Whereabouts I couldn't say.

Q. Captain, in your testimony yesterday did you state to his honor and to the court what a bracket which would hold a lifeline or a life preserver would look like and how it would be attached to the vessel?

A. I stated as to how it could be attached to a barge, [fol. 507] but I didn't state as to how it could be attached to the bulkhead of a vessel.

* * * * * * *

Q. Captain, will you turn to the page of the next white slip? You note at the bottom of the page that it is marked 15-D. Can you tell us what that picture represents?

A. That picture represents a towboat and twelve barges, oil barges or tank barges.

Q. Captain, as far as you can see are those barges manned or unmanned?

[fol. 508] A. With the exception of one there—it could be a housing but I don't think it is—the rest of the barges are unmanned as far as I see.

Q. Captain, do you note on that photograph two circles in ink which I placed there?

A. Yes, sir, I do.

Q. Can you point out what is inside those circles?

A. They are ring buoys.

Q. And they are on the unmanned or the possibly manned barge?

A. Yes, sir.

Q. Which one is that?

A. They are on the unmanned barge. This is possibly a manned barge, or could be. It might be a housing over a motor or pumps. I don't know.

Q. But the circles which show the life rings are on the unmanned barge. Is that correct?

A. Yes, sir.

Q. Captain, will you turn to the next white slip? You will note that it is marked on the bottom of the page in pencil 15-E. Will you tell us what that picture represents?

A. It shows a tank barge with a man aboard.

Q. Captain, is that barge a manned or an unmanned barge?

[fol. 509] A. At the present time it would be manned.

Q. Why, Captain?

A. Because there are men on it or a man.

Mr. Love: We move to strike the question and answer.

The Court: I will sustain the objection here. On all these questions as to whether a barge is manned or unmanned, it is my conclusion that that is a legal question and not a factual question, that is, what manned means and what unmanned means.

Of course, we know that it is a factual question as to whether there is a man on the barge at a particular time, but as to whether that makes the barge a manned or unmanned barge I think is a legal question.

* * * * * * *

[fol. 512] Mr. Love: I do want to ask the witness, however, with respect to his opinion that one or more of these barges was a Standard Oil barge.

Cross examination.

By Mr. Love:

Q. Will you tell me which one or more you think were?

A. Where were they marked?

Q. You tell me, please, sir.

A. Wherever you have the markings.

* * * * * * *

[fol. 513] A. That is a Standard Oil barge. (Indicating)

Q. You are now referring to—

A. That barge.

Q. —15-A?

[fol. 514] A. Yes, sir.

Q. You say that's a Standard Oil barge?

A. Yes, sir.

Q. In your opinion?

A. In my opinion, yes, sir.

Q. All right, sir. Now, there are four divisions of the Standard Oil Company and I would like to know first which Standard Oil Company you are referring to.

A. Standard Oil of Louisiana.

Q. Standard Oil of Louisiana. Can you tell me the certification—first, you can identify the barge, can you?

A. I can identify the barge as being a Standard Oil barge.

Q. But not which one?

A. Not which one.

Q. Will you tell me what the certification is?

A. No, I couldn't.

Q. Well, then, you don't know whether it is certificated for inland waters or for the Gulf or for what it may be certificated, do you?

. . . . . .

[fol. 515] A. It would be bound to be certificated for inland waters. Otherwise it wouldn't ply on the rivers.

Q. Yes, sir, but it could also be certificated for the Gulf and other waters, couldn't it?

A. It could be, yes, sir.

Q. Do you know, going back to my question, for what purposes that barge is certificated, and, if so, tell us what.

A. It would be certificated for the carriage of oil or gasolines.

Q. And you don't know whether it is for inland or Gulf or both or either?

A. I do know that it is for inland waters.

Q. But you don't know whether that's all, do you?

A. No, sir, I don't.

Q. And if it were certificated for use in the Gulf, then it would be required to carry rings, wouldn't it?

A. My license—

[fol. 516] Q. I didn't ask you about your license.

The Court: Answer, if you know. Questions that can be answered yes or no—

A. I wouldn't know.

The Court: Questions that can be answered yes or no, answer it that way and then make explanation, if you have one.

By Mr. Love:

Q. In fact, you don't know what barge that is or where it is or how it is certificated, do you?

A. I would say that is a Standard Oil barge on the waters of the Mississippi River.

Q. Do you have an opinion on the ownership of any of those other barges? I thought you gave an opinion on title as to two of them, but I could be mistaken.

A. I believe I did, yes, sir.

The Court: The other was where the barge was at the side of the vessel.

The Witness: Of the dock.

The Court: Of the dock, yes, sir.

Q. You are now referring to 15-B?

A. 15-B, yes, sir.

Q. Did you express an opinion—I am not going to ask you that opinion—as to who owned it?

A. I expressed an opinion that the Standard Oil Com-

[fol. 517] pany owned this.

Q. Which Standard Oil Company?

A. Of Louisiana.

Q. Will you tell us how you distinguish that without any names or anything on the barges?

A. The way we learn from the beginning—

Q. I didn't ask you how you learned. I want to know how you distinguish it.

A. I am trying to explain to you how I can distinguish this particular barge is from our knowledge of memory of

seeing an object or parts of the river. That is the way we acquire our license to pilot or a licensed officer on a vessel of any kind, is memory.

The Court: You mean you are required in order to gain a license to have a knowledge of this kind that you can distinguish ownership of various barges?

The Witness: Not ownership, no, sir, but objects along the river and on the river. We on the river can see a boat miles down the river and just from the outline of that boat, superstructure of that boat, we can tell you without seeing it what boat that is coming without seeing the name.

The Court: The question is whether you can tell in that way who owns a certain vessel.

[fol. 518] The Witness: Well, you know that from past experience of seeing the vessel in their tow and in their landings and reading on the vessels, on the barges, Standard Oil or Union Barge Line.

The Court: So what you are saying now is that this barge in the picture is the type of barge that you know to be owned by Standard Oil of Louisiana?

The Witness: It would be my opinion, yes, sir.

By Mr. Love:

Q. And, of course, you don't know any more about the certification of that barge than you do the other one, do you?

A. No, sir.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Johnson: Your honor, at the time these pictures were introduced I objected to them on the ground that they were immaterial and irrelevant. I don't want to recede from that position, but we would like to cross-examine this witness with respect to the contents of this book other than those portions which have been put in evidence, and if in order to do so it is necessary that we make certain other portions of the book our exhibits in order to cross-examine him with respect to those exhibits or the rest of the book, I would like to do that at this time.

[fol. 519] Mr. Goldstein: I renew my objection, sir.

The Court: I think it would be necessary for you to point out and have marked the parts that you wish to examine him about.

Mr. Johnson: That's what I intend to do, your honor.

The Court: All right.

Mr. Johnson: Mark this Defendant Number Two, Exhibit 6-A

Mr. Goldstein: Your honor, before they are admitted into evidence may I see the articles and see if I have any objection to their pertinency?

The Court: Yes, sir.

Mr. Johnson: I will state what we are doing. On looking through this book we discovered—

Mr. Love: I can't hear you.

Mr. Johnson: I say, what I am attempting to show is that there are in that book which contains these exhibits a great number of pictures of barges of all kinds, sizes, shapes and descriptions, and an overwhelming majority of them, as shown by the pictures, do not contain any life rings such as are shown in the few pictures which have already been placed in evidence.

Mr. Goldstein: May I ask if that is the sole purpose of the introduction of this evidence, just to show that there [fol. 520] are vessels that don't have life rings in the picture?

Mr. Johnson: That's all at the moment.

Mr. Goldstein: May I place my objection on two points? Number one, we will concede that there are certain companies or at least one company that does not carry life rings on its barges. That is Union Carbide.

Number two, the mere fact that these life rings cannot be seen in these pictures does not in any way prove that they are not on the vessel. They may be out of view. They may be hidden by other deck equipment and that's incompetent to show the absence of any life rings on those pictures.

Mr. Love: If your honor please, a statement was made by counsel in this case with respect to Union Carbide and not with respect to any other company, and I ask your honor to strike that from the record.

The Court: Sustained. That will be stricken from the record and the objection will be overruled as to the introduction of these photographs.

Mr. Goldstein: If your honor please, as to the first point concerning Union Carbide, their answers to the—

Mr. Love: I didn't hear you.

Mr. Goldstein: As to the first answer concerning Union Carbide, their answer to our interrogatories propounded [fol. 521] to them by the plaintiff states specifically that there were no life rings ever purchased for the CC-204 and on that basis I made my statement and I will stand by it.

The Court: I have already expunged it as improper and you shouldn't have made it.

Mr. Love: Correct.

OFFERS IN EVIDENCE

The Clerk: Defendant Number 2, Exhibits 5-A to 5-Q, inclusive, admitted.

Defendant Number 2, Exhibits 5-A through 5Q.

The photographs referred to were thereupon marked as indicated above and received in evidence.

Cross examination.

By Mr. Johnson:

Q. First of all, Captain, I understood you to testify yesterday that it was not customary for barges to carry life rings and similar equipment. That is true, isn't it?

A. I might have testified that it was not customary on some barges. I didn't say all barges.

Q. Don't you recall that you testified yesterday that when barges are in tow it is customary and usual to carry life rings, life jackets on the towboat and not on the barges?

A. I don't think that I meant that it wouldn't be cus- [fol. 522] tomary, but it was the practice on the boat to have life rings and life jackets.

Q. Did you or did you not so testify yesterday? Certainly you can recall what you said on the stand yesterday.

A. In the exact words, would you say that would be the exact words that I used yesterday?

Q. No, I am not purporting to give you the exact words. I am giving you the substance of your testimony as I recall it and I am asking you if you don't recall that you so testified.

A. I think I testified that when barges were in tow that there were lifesaving equipment aboard the vessel. As to whether it was on the barges, I don't recall whether I said all or not.

Q. You don't recall whether you testified to that effect or not?

A. But I do recall saying there would be lifesaving equipment on the barge—on the vessel, on the boat.

Q. You have pointed out in these exhibits about which you have testified on direct examination a number of barges, five or six I believe, which contained life rings or which show in these pictures life rings. I would like to ask you to examine this picture in the same book which is marked as Defendant Number 2's Exhibit 5-A, and I will ask you [fol. 523] if it is not true that there are no life rings upon the barges shown in that picture so far as the picture discloses.

The Court: I think, Mr. Johnson, that the picture will speak for itself and you may assume, if it is true, that the picture shows no life rings and go on to the next.

* * * * * * * *

By Mr. Johnson:

Q. I will ask you if those are not cargo barges.

A. Some are. They are cargo barges, yes, sir.

Q. Can you tell from that picture where they are?

A. This would be a cargo barge, a covered type cargo barge. That is what you mean, a deck type. This would be a deck type cargo barge, and so is this one.

Q. You are talking about the barges in the foreground of the picture?

A. The barges in the foreground of the picture, and I would assume that this barge is owned by the Ashland Oil

and Refining Company. This here would be a cargo deck barge.

[fol. 524] Q. Can you tell on what river those barges are?

A. At this particular time?

Q. Yes.

A. No, sir, because I see no water or banks.

Q. Do you know where they operate, those barges in that picture?

A. Anywhere. They could be anywhere on the Ohio or Mississippi Rivers or possibly on the Kanawha River.

Q. Next I refer you to Defendant Number 2, Exhibit 5-B and ask you what those barges are as shown in that picture or in those pictures.

A. This here, this barge here is a tank barge, deck level type, a deck type.

Q. Isn't that barge very similar to the CC-204? That is the barge, pictures of which you were shown in connection with this case.

A. It is, yes, sir. It is similar.

Q. Same type of barge?

A. It is the same type of barge with the exception of the CC-204, I believe, has two pipelines out through the middle, where this only has a single one.

Q. Here on the starboard side of the tow there is another similar barge, is there not?

[fol. 525] A. Yes, sir.

Q. And here in front of the barge on the port side there is another similar barge?

A. Yes.

Q. And in the middle here is a different type of tank barge?

A. Yes.

Q. And forward of that is a hopper barge?

A. Yes, sir.

Q. And at the starboard is the hopper barge, a cargo barge with a roof over it?

A. Covered top, yes, sir.

Q. I will then direct your attention to the opposite page and that is marked as Exhibit 5-C. The barges in the foreground there are tank barges of a different type, are

they not, that is, different from the barge involved in this case?

A. Yes, sir, they are.

Q. But tank barges nevertheless?

A. But tank barges, yes, sir.

Q. And forward—I won't go into that. It is so hazy you can't see what is forward. I direct your attention to Exhibit 5-D and ask you if the barges shown in that picture are not tank barges of the type very similar to the [fol. 526] one involved in this case.

A. This barge would be with the exception of this tank here. I don't think the CC-204 has—

Mr. Love: I can't hear him.

The Witness: I don't think the CC-204 has such a tank on deck.

The Court: As you go through looking at these barges I think it would be well if you see in any of the pictures any indication of life rings or any other safety equipment being on the barges, that you should mention that.

Mr. Johnson: Yes.

Q. Can you tell from the picture where that picture was taken, which river or which portion of the river?

A. I couldn't tell you the portion but I would assume it is on the Mississippi River.

Q. You assume by the breadth of the river and the flat banks?

A. By the breadth and flat banks, yes, sir.

Q. Now, I direct your attention to a picture that has been marked as our Exhibit 5-D and I will ask you what type of barge this is, a portion of which is shown in the foreground.

A. This one here?

Q. Yes.

[fol. 527] A. This would be a sand barge.

Q. Right behind that appears to be a tank barge.

A. Yes, sir.

Q. And behind that there is an assortment of different types of barges of a considerable number.

A. Yes, sir.

Q. Can you tell where that picture is taken?

A. That picture is taken, I believe, on the Ohio River. This boat coming here is either the Charles T. Campbell or the John W. Hooker.

Q. Directing your attention to a picture that has been marked 5-E, that evidently shows a flotilla of hopper barges. Is that correct?

A. Yes.

Q. Can you tell me where that picture was taken?

A. That picture was taken at Emsworth Lock on the Ohio River.

Q. Now I direct your attention to Exhibit 5-F and I will ask you what those barges are, what that picture shows.

A. This picture shows the barge being loaded with pipe and this barge, I believe, would either be—I would assume that that would be fluorspar. That is used in the mills. It comes from the Ohio River down near Cave and Rock or Rosa Clair.

[fol. 528] Q. Those four barges are what are called hopper barges?

A. Yes, sir.

Q. And that was on what river did you say?

A. The Ohio River.

Q. Turning to the Plaintiff's Exhibit 15-D, about which you have already testified, how many barges are there in that flotilla?

A. There are twelve.

Q. And the life rings which were circled and about which you testified appear on only two out of those twelve barges?

A. Those are the only two life rings that show up in this picture.

Q. Well, that's what I mean. Now, those barges are all tank barges but of different types, isn't that true?

A. That's true.

Q. Incidentally, is that the famous Sprague?

A. Yes, sir.

Q. Which was the biggest towboat on the river?

A. Stern-wheeler, yes, sir.

Q. On Exhibits 5-H and 5-I, which are opposite each other in the book, I will ask you what type of barges are shown in the picture, in those pictures.

A. We have covered top cargo barges in both pictures. [fol. 529] Q. And in the background of 5-H there are some coal hopper barges, isn't that true?

A. Yes, sir.

Q. And in the background of 5-I there are some coal hopper barges and a covered cargo barge.

A. Yes, sir.

Q. And where were those pictures taken?

A. At Weirton, West Virginia.

Q. Both of them?

A. Yes, sir.

Q. Now, I direct your attention to Exhibit 5-K, which appears to show a flotilla of tank barges with perhaps one or two smaller barges of another type. Is that correct?

A. Yes, sir, several tank barges.

Q. Can you tell where that picture was taken, that is, on what river?

A. It was taken on the Ohio River.

Q. Now, directing your attention to Exhibit 5-L, there are a number of coal hopper barges shown in that picture. Is that right?

A. Yes, sir.

Q. Can you tell me how many in that tow?

A. I don't know whether this is a coupling or a shadow. [fol. 530] There would be eight or possibly ten and a fuel flat and a pump boat.

Q. Can you tell on what river that picture was taken?

A. On the Kanawha River.

Q. Can you tell where on the Kanawha River?

A. There is bends similar to that on the Kanawha River.

Q. But you do feel reasonably certain it was on the Kanawha?

A. Yes, sir.

Q. Directing your attention to Exhibit 5-M, that purports to show a tank barge in the foreground. Is that correct?

A. Yes, sir.

Q. And beyond that there are a number of other tank barges in the background?

A. Yes.

Q. And some open hoppers to port and starboard, is that right?

A. Yes, sir.

Q. Can you tell where that picture was taken?

A. That was taken at Gallipolis Dam.

Q. Now, I direct your attention to Exhibit 5-N, which appears to show a number of tank barges and open hopper barges, and ask you if you can tell where that picture was taken.

[fol. 531] A. At Gallipolis Lock.

Q. That is the same place 5-M was taken?

A. Same place.

Q. In fact, it appears that the barges are the same.

A. Same tow, yes, sir.

Q. Directing your attention to 5-O, it appears that there are two or more open hopper barges shown in that picture lying astern of the barge which cannot be identified. Do you agree with that?

A. Yes, sir.

Q. Can you tell where that picture was taken?

A. No, I can't.

Q. Directing your attention to Exhibit 5-P, there are a very large number of barges of different kinds shown in that tow, are there not?

A. Yes, sir.

Q. What kind of a barge is that in the left foreground?

A. That's a tank barge.

Q. And what kind of a barge is that in the right foreground?

A. A tank barge.

Q. Can you tell where that picture was taken?

A. It was taken somewhere up on the upper Ohio River [fol. 532] near Pittsburgh around Aliquippa.

Q. Now, in conclusion, directing your attention to Exhibit 5-Q, what kind of barges are shown in that picture?

A. They are a covered type of cargo barge where the tops roll back from the center back to each stern and bow.

Q. Can you tell on what river that picture was taken?

A. No, sir.

Q. That from the picture looks like it might be on the high seas, doesn't it?

A. It could be.

. . . . . .

[fol. 534]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court: I am going to make a finding of fact and conclusions of law, and in doing so I do not expect to discuss the facts or the law any further than is enough to show an appellate court, if the case should be appealed, the basis on which I rest the findings both of fact and of law.

The findings of fact, then, are these:

First: There was no safety or rescue equipment on the barge from which the plaintiff fell to his death.

Two: It was foreseeable to defendant Union Carbide and Carbon Corporation, as its name was then—is that its name then or now?

Mr. Love: Then. That's the name in the case.

The Court: That in the sandblasting operations which they knew or should have known would be carried on on the barge by Amherst Barge Company for the purpose of the work that was then being done on the barge that many men would work on the barge in the manner Goett was working.

Three: That under these circumstances it was negligence for Union Carbide and Carbon Corporation to omit equipping the barge with reasonably effective and available safety and rescue equipment.

Four: The barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was [fol. 535] being used.

Five: Failure to provide rescue equipment was the proximate cause of Goett's death.

Findings of fact as to damages: the court finds that the amount which is fair and just to cover the intangible damages of the deceased's family, including mental anguish and bereavement, is the sum of $5,000, that in addition

to damages for those elements the court finds that the distributees suffered financial and pecuniary loss in an amount exceeding, when added to the $5,000, the sum of $20,000, and that therefore under the rule of law which I apply to this case the amount of damages that are to be included in the recovery is $20,000.

I find that no punitive damages are proper in this case.

Proceeding, as was suggested, to find what would be the recovery in case the limitation set down by the West Virginia wrongful death statute is not applicable, I find these facts with reference to damages: that the reasonably expected annual earnings of Mr. Goett which would have been attributable to the expenses of his family rather than his own expenses, is $1500 a year for the entire expectancy of thirty-six years; and in arriving at that [fol. 536] figure I take into consideration the fact that by the time of the expiration of his expectancy Mr. Goett would be a fairly old man and that he could not reasonably be expected, in view of the general health hazards of life, to earn during his entire expectancy the amount that he earned during the immediate week preceding his death, but that he probably would earn an amount for the whole length of time which would average what he made in the six months before his death, which would mean about $2800 a year, and I find that of that sum it would be reasonable to assume that he would use all but $1500 for his own maintenance expenses; so if he earned $1500 a year for thirty-six years, he would in that time earn $54,000 applicable to the expenses of his family.

I think that the present worth of that sum of money should be calculated on a four per cent basis rather than a three per cent basis. Calculated on a four per cent basis, I find that it amounts to $31,400.

I find further that the amount which is fair and just to compensate for the nurture of the deceased's daughter, who was living with him for the period of her infancy, is $5,000; and I further find that the amount which is fair and just to compensate for the pain and suffering of Mr. Goett himself and other intangible losses which are properly compensable under the rules of admiralty is

$3600, all of which added together produces a total of [fol. 537] $50,000 as the grand total, which would be a fair and just award if there were no limitation as fixed by the West Virginia statute.

Conclusions of law are as follows: I find that this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown, as I have said.

I conclude that it was the duty of the Union Carbide and Carbon Corporation under the circumstances of this case to provide both reasonable safety equipment in order to furnish workmen who worked on the barge a safe place to work, and I am thinking in that connection of measures such as life lines or stanchions, as they are called, to prevent falling off the unprotected deck; and it was also the duty of Carbide to provide reasonably suitable rescue equipment, which it was their duty to place in a position on the barge where it would be immediately available in case of need.

I find further as a conclusion of law that Union Carbide and Carbon Corporation is not responsible for any negligence, if such there was, on the part of Amherst Barge Company in not furnishing to the workmen the life jackets that made up a greater part of the testimony.

On the question of contributory negligence my conclu- [fol. 538] sion is that Mr. Goett was not guilty of any negligence that contributed to his death. I, in explanation of that, conclude that it is the burden of the one alleging contributory negligence to prove that contributory negligence by a preponderance of the evidence.

Under the evidence in this case it is quite possible and just as probable to my mind that Goett may have accidentally fallen without any negligence at all on his part as that he negligently went over the side. There are many constructions on the deck, some of them close to the edge, and he may have struck one of those, and if he did there is no evidence that he was negligent in so doing.

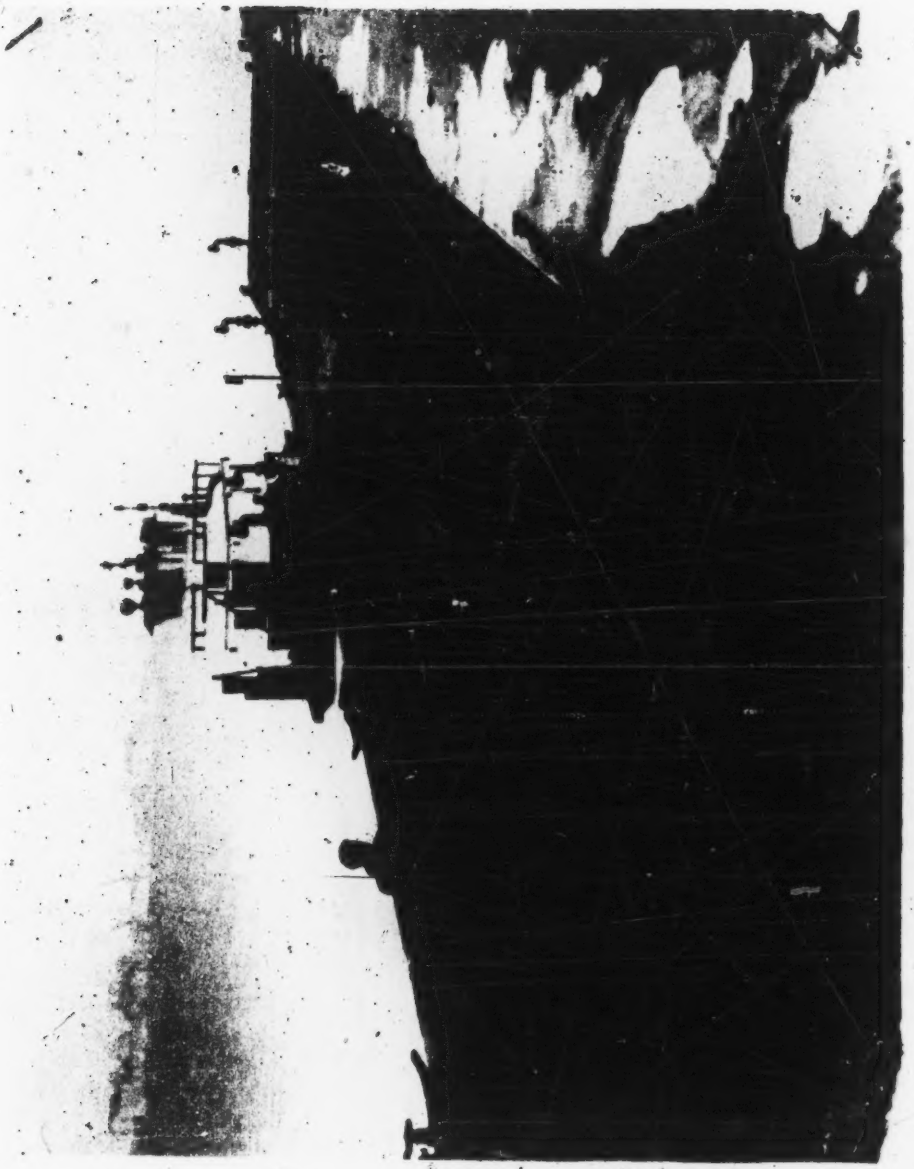
As to the doctrine of assumption of risk, I conclude that under the circumstances of this case Goett did not assume the risk of the danger which caused his death. I think it is not necessary to decide whether he did or did not assume

the risk of falling over the side of the boat. It was not the fall that caused his death. The cause of his death, as I have found in my findings of fact, was the failure of Union Carbide and Carbon Corporation to have available rescue equipment, and that is a risk which I conclude Goett did not assume.

The final conclusion of law is that the plaintiff is entitled to recover against defendant Union Carbide and Carbon [fol. 539] Corporation in the sum of $20,000. The other findings with reference to damages are cut off by my decision that the limitation in the West Virginia statute applies to this case, so I make no conclusion of law with reference to the excess damages except to say that if my conclusion is correct that the limitation applies, that the plaintiff is therefore not entitled to recover in this action anything beyond $20,000.

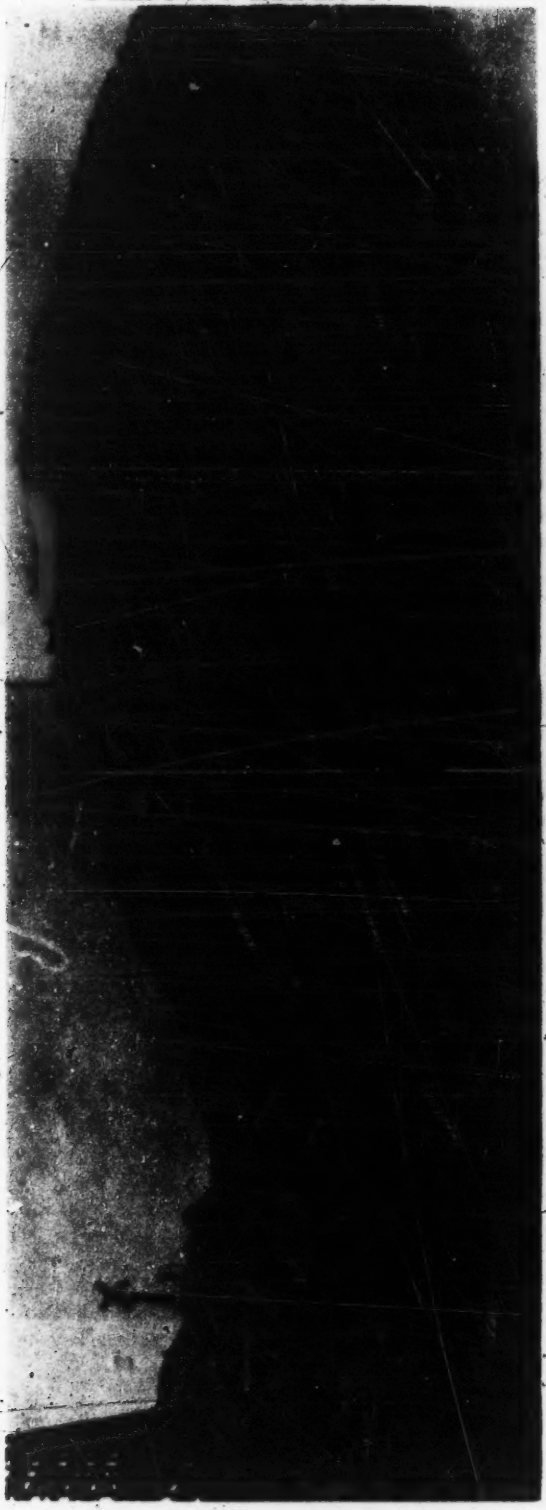
* * * * * * *

[fol. 547] Reporter's Certificate to foregoing transcript (omitted in printing).



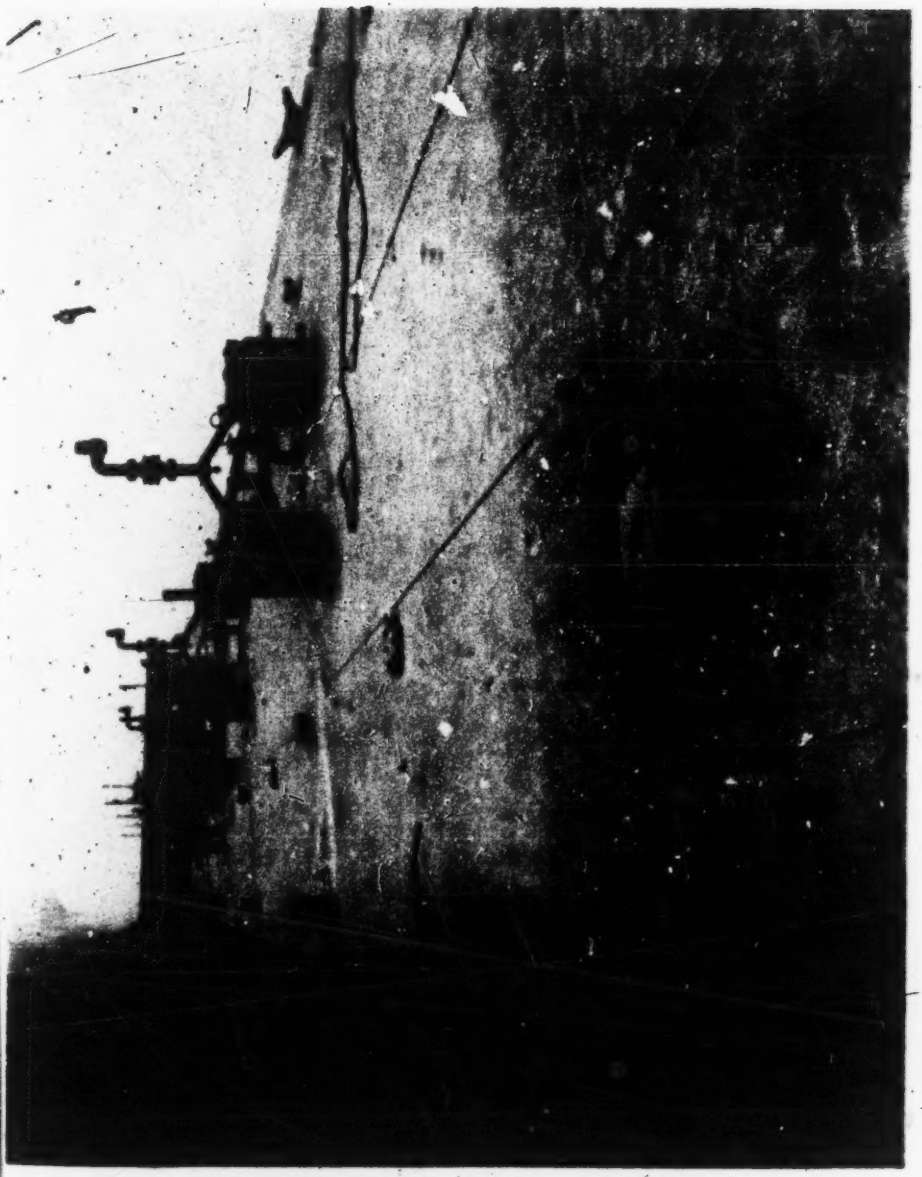
[fol. 552]

PLAINTIFF'S EXHIBIT 5.



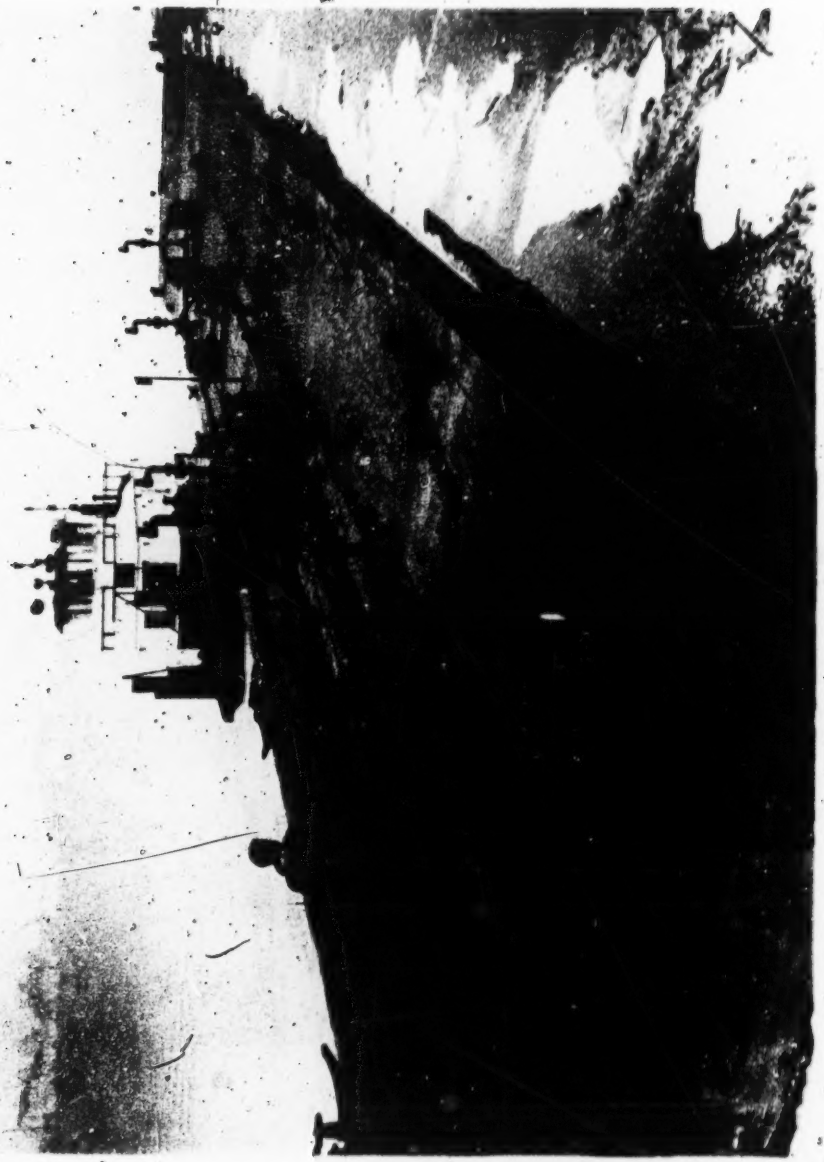
[fol. 553]

PLAINTIFF'S EXHIBIT 6



[fol. 554]

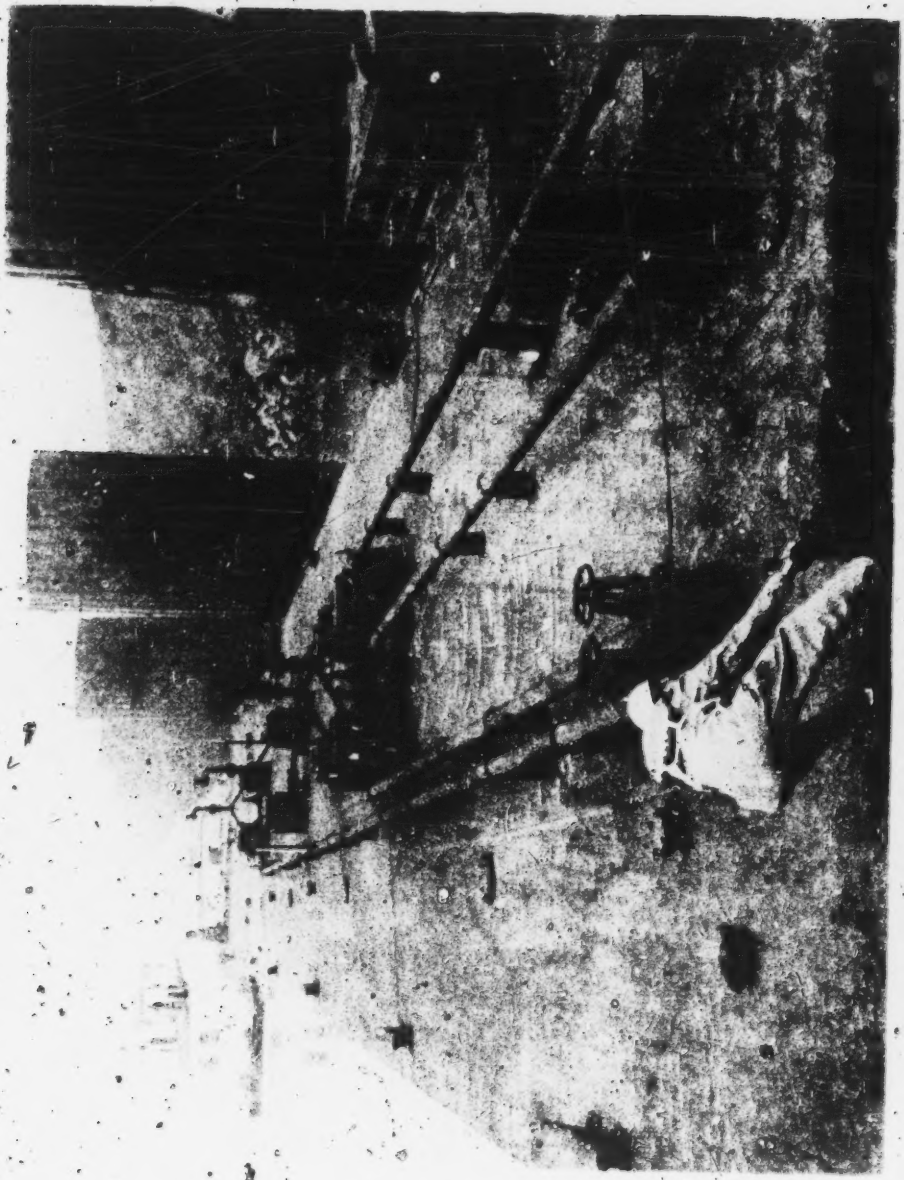
PLAINTIFF'S EXHIBIT 7



[fol. 555]

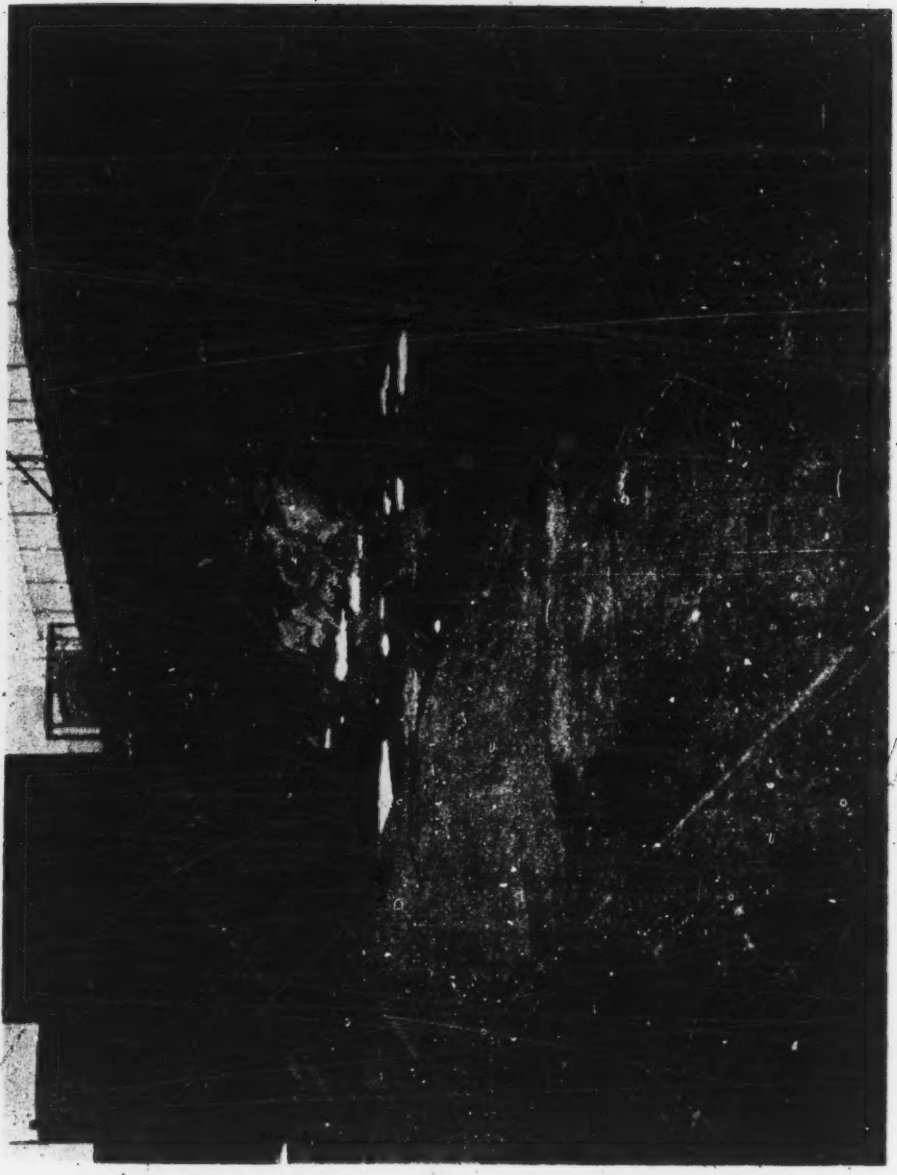
PLAINTIFF'S EXHIBIT 8

PLAINTIFF'S EXHIBIT 9



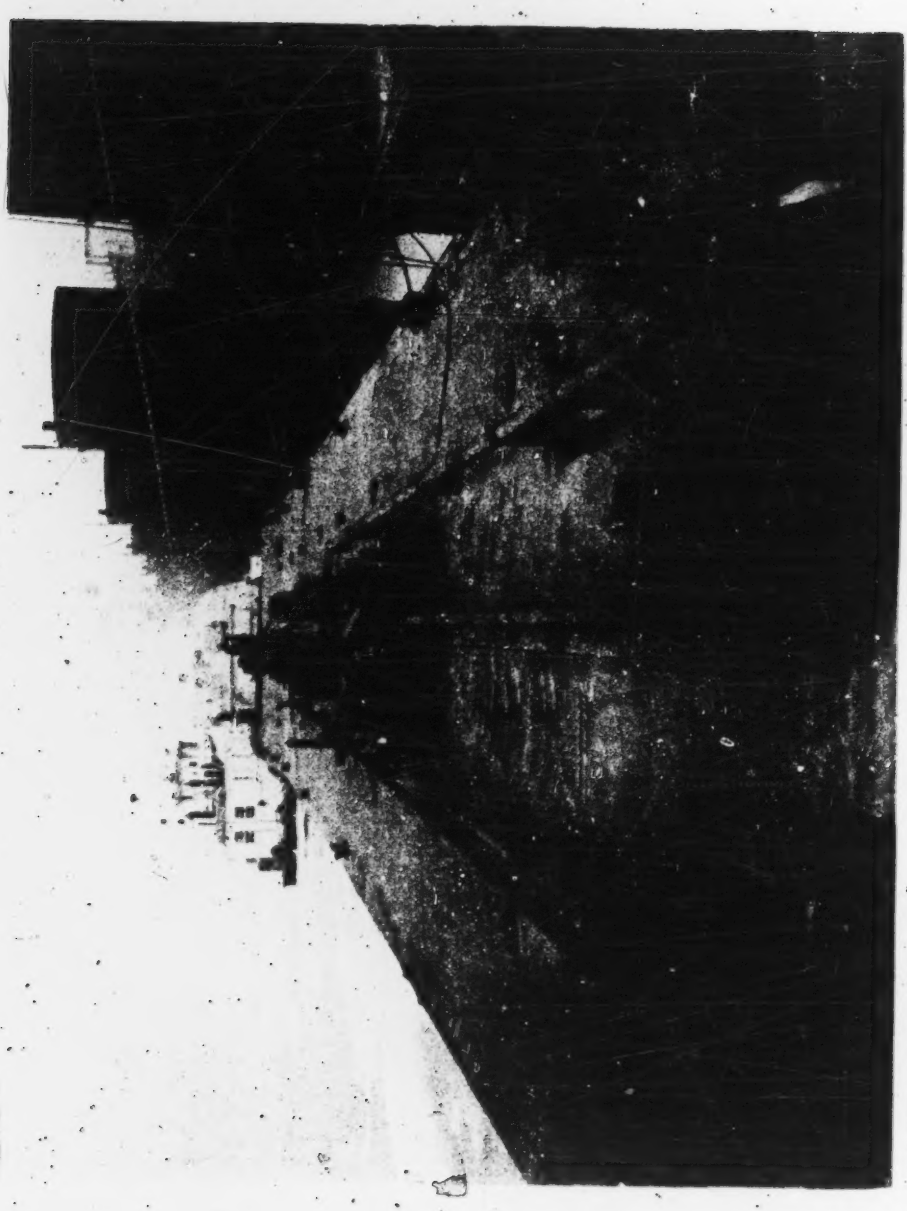
[fol. 557]

PLAINTIFF'S EXHIBIT 10



[fol. 558]

PLAINTIFF'S EXHIBIT 11



[fol. 559]

PLAINTIFF'S EXHIBIT 12

CARBIDE AND CARBON CHEMICALS COMPANY
A DIVISION OF UNION CARBIDE AND CARBON CORPORATION
P. O. Box 8004, South Charleston 3, West Virginia

PURCHASE ORDER
314- 83285

MAIL INVOICE IN DUPLICATE, BILL OF LADING AND SHIPPING NOTICE TO ABOVE ADDRESS UNLESS OTHERWISE INDICATED BELOW

MAIL CERTIFIED STATEMENT HERE TO GENERAL ACCOUNTING DEPT., ROOM 2000, 30 E. 42ND ST., NEW YORK 17, N. Y.

THE ABOVE PURCHASE ORDER NUMBER SHOULD APPEAR ON ALL PACKAGES, INVOICES AND B/L PERTAINING TO THIS PURCHASE ORDER.

Amherst Barge Co.

Reed, W. Va.

Plaintiffs Ex. No. 12
For Identification
Filed
Case

DATE OF ORDER
10-12-55

PAGE 1 OF

WE HEREBY ORDER SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS AND THOSE PRINTED ON THE REVERSE SIDE HEREOF

DATE TO BE SHIPPED BY 10-15-55		F. O. B.	Point	Dept.	Seller's Dock
TRANSPORTATION TERMS	Acct. of Buyer X	Acct. of Seller Transp. Prepaid			
SHIP VIA	Parcel Post	Truck Frt.	Rail Frt.	Dlvy. Exp.	Our Tow
TERMS OF PAYMENT	Due On Date X				

NOTE: "Where transportation is for account of Buyer on shipments subject to Rule 15(2)(C) of Uniform Freight Classification No. 3, tariff number Item 33440 of National Motor Classification Nos. 12 and A3 (Local), or successive issues thereof, the released value of the shipment shall be released on the bill of lading at not exceeding 50 cents per pound or the amount prescribed in such Items."

SPECIAL SHIPPING INSTRUCTIONS

ITEM NO.	BUYER'S ACCOUNT NUMBER	QUANTITY	DESCRIPTION	PRICE
1	740-885-0-9204	1	To cover cost of labor and material for Sand Blasting and Painting our Barge CC 204.	Approx. $2,247.00 net lot
2	"	1	Gas Free Certificate.	Price Advise
3	"	1	Minor Repairs.	Price Advise

Note 1: Buyer will furnish necessary Dimetcote #3 and D-3 Curing Solution.

Note 2: Barge will be delivered to your dock by our tow.

Note 3: Notify Buyer when work is completed so our tow may be dispatched for Pick Up.

Refer to your quotation dated 9-14-55.

E. A. Graham

ADDRESS ANY QUESTIONS RELATIVE TO THIS ORDER TO

PLEASE ACKNOWLEDGE ACCEPTANCE OF THIS ORDER AND ADVISE WHEN SHIPMENT WILL BE MADE OR WORK PERFORMED

J R Cuccaro
WORKS PURCHASING AGENT
M. W. White

SPO 55-17-10-52

[fol. 559a]

TERMS AND CONDITIONS

QUALITY: Seller warrants that the goods will conform to description and specifications and will be free from all defects in material and workmanship. Buyer shall have the right to inspect and test any goods before acceptance if such inspection and test are made within a reasonable time or as provided in the specifications. Seller shall pay the cost of inspecting and testing of goods rejected and all transportation charges thereon.

QUANTITY: Goods shipped in excess of quantity designated in Formal Purchase Order may be returned at Seller's expense.

PRICE: In case the price specified herein includes the payment or allowance of any transportation charges by Seller, Buyer shall be charged with any increase or credited with any decrease in such transportation charges caused by changes in the rates for such transportation in effect at the date hereof.

DELIVERY: Each package shall be numbered and labelled with Buyer's order number, stock number, contents and weight; shall contain an itemized packing slip and shall be properly packed for shipment. No charges will be allowed for packing, cartage, freight, express or carriage unless specified on the face hereof. Time is of the essence hereof and if any goods are not delivered within the time specified on this purchase order or within a reasonable time if no time is so specified Buyer may refuse to accept such goods and may cancel this agreement.

INVOICES: Invoices shall (a) be rendered separately for each delivery; (b) cover not more than one order; (c) be rendered with order number or noted thereon. If invoice is subject to cash discount the discount period will be calculated from the date the invoice is received by Buyer. Where shipments are made from the United States into Canada, or vice versa, certified Customs Invoices in triplicate must be supplied, in addition to the regular commercial invoices, and forwarded immediately after shipment to Buyer. All monthly statements shall be mailed to Buyer at its main office, No. 30 East 42nd Street, New York City, marked for attention of General Accounting Department, Room 227.

PATENTS: Seller shall protect and indemnify Buyer from and against all claims, damages, judgments, expenses and loss arising from infringement or alleged infringement of any patent of the United States or, if shipment is to be made into Canada, of any patent of Canada, by any of the goods delivered hereunder, but Seller does not warrant against infringement by reason of the use thereof in combination with other materials or in the operation of any process, and Seller shall defend or settle at its own expense any suit or proceeding brought against Buyer for such infringement, provided that Seller is notified promptly in writing of the commencement of such suit or proceeding and is given authority, information and assistance by Buyer for the defense or settlement thereof.

INSTALLATION: In the event that any articles ordered hereunder require, in connection with the installation thereof, the services of a supervisor, expert or other employee connected with or employed by Seller, and Seller agrees to furnish the same, either with or without charge, such supervisor, expert or other employee in performing such services shall not be deemed to be the agent or employee of Buyer, and Seller assumes full responsibility for his acts and omissions and exclusive liability for any payroll taxes or contributions imposed by any federal or state law dealing with any of the subjects covered by the Federal Social Security Act approved August 14, 1935.

INSURANCE: If this agreement provides for work to be performed by Seller on property owned or controlled by Buyer, or on property of others named herein, Seller shall insure to each of its employees engaged upon the work the compensation provided for by, and shall strictly comply with, each and every statute applicable thereto with respect to Workmen's Compensation and/or Employers' Liability and shall procure and maintain, at the cost and expense of the Seller, until final acceptance of the work by the Buyer, Public Liability Insurance in a reputable and financially responsible insurance company, properly safeguarding the Seller against liability for injuries to persons, including injuries resulting in death, in amounts acceptable to the Buyer, and shall furnish to Buyer written certificates from insurance carriers or from appropriate Governmental authorities establishing that said insurance of employees and said Public Liability Insurance have been procured and are being properly maintained, and that the premiums therefor are paid, and specifying the names of the insurers and the respective policy numbers and expiration dates. All such insurance policies shall provide (unless by statute applicable thereto it is otherwise provided) that in the event of cancellation thereof, written notice of such cancellation shall be given to Buyer at least five (5) days prior to the effective date of such cancellation.

CONTINGENCIES: Neither party hereto shall be liable to the other for default or delay in delivering or accepting goods hereunder if caused by fire, strike, riot, war, act of God, delay of carriers, governmental order or regulation, complete or partial shut down of plant by reason of inability to obtain sufficient raw materials or power and/or any other similar or different contingency beyond the reasonable control of the respective parties.

DRAWINGS, ETC.: All drawings, blue prints, sheet patterns, tools, printing plates, etc., prepared or constructed by Seller and paid for by Buyer shall be the property of Buyer, and upon completion of deliveries hereunder, or upon termination of this agreement, shall be delivered to Buyer.

GOVERNING LAW: The interpretation and performance of this agreement shall be governed by the law of the State of New York and the provisions of this agreement shall be subject to all applicable laws and regulations of the Federal Government.

FAIR LABOR STANDARDS ACT: Seller hereby agrees that the goods will be produced in compliance with all applicable requirements of sections 6, 7 and 12 of the Fair Labor Standards Act, as amended and of Regulations and Orders of the U. S. Dept. of Labor issued under Section 15 thereof and agrees to so certify on its invoices if so directed by a stamp placed on the face of this purchase order.

OTHER TERMS: Any different terms or conditions in Seller's acknowledgment of this purchase order are not binding on Buyer unless accepted in writing by Buyer and shipment of goods pursuant to this purchase order shall be deemed to be an acceptance by Seller of the Terms and Conditions of this purchase order.

[fol. 560]

PLAINTIFF'S EXHIBIT 13

SPECIFICATIONS

PAINTING OF BARGE CC #204

Plaintiff's Ex. No. 13
For Identification
Filed
Case No.

GENERAL

The bottom and sides of subject barge are to be coated with an experimental zinc-lead inorganic coating named Dimetcote-3 and which is manufactured by The Amercoat Corporation. This coating has been described as a "Cold-galvanizing" process. The deck and Boot Top are to be coated with the standard paint for barges, "Yankee-Clipper". The applications of Dimetcote-3 and the "Yankee-Clipper" are to be made by The Amherst Barge Company of Reed, West Virginia. The Amercoat Corporation is to be represented by Mr. William Morrow, Sales Engineer, who will furnish advise as to the application procedure for the Dimetcote.

DETAILS

PART A- BOTTOM AND SIDES

All areas of the bottom and sides (including those of the rakes and the fore and aft headlogs) up to the level of the deck are to be coated per the standard procedure specifications of The Carbide and Carbon Chemicals Company and the recommendations of The Amercoat Corporation.

SURFACE PREPARATION - All areas for PART A, as described above, are to be blast cleaned to a No. 1 Commercial Quality Finish as defined in the following. All old paint, dirt, grease, rust, mill scale, corrosion products, etc. are to be completely removed. Following this operation all loose dirt, sand, etc. are to be removed by brushing off or blowing off the surfaces with clean dry air.

COATING APPLICATION

1. Apply Dimetcote-3 Coating per the standard Carbide and Carbon Chemicals Company attached and according to the advice of The Amercoat Corporation representative.

   Final dry film thickness shall be two (2) mils minimum and shall average two (2) to three (3) mils.

PART B-DECK AND BOOT TOPPING

The area to be coated in PART B of these specifications shall include all of the deck, the head logs (fore and aft) and the Boot Top which

[fol. 560a]

PART B -- DECK AND BOOT TOPPING (Continued)

is to extend downward from the deck for a distance of one and one half feet on each side of the barge.

NOTE: The work on PART B shall be performed only after the sides are coated with Dimetcote-3, as per PART A.

SURFACE PREPARATION

The deck area only is to be blast cleaned to a "Brush-Off" Quality Finish. This work is defined to mean that all loose rust, loose mill scale, loose paint, dirt, grease, etc. are to be removed.

NOTE: Do not blast the Boot Top area.

PAINT APPLICATION

.....gray coats of "Tankoo-Clipper" paint.

J. L. Barker
Coatings Engineer
Works Engineering Department

JLB/gA
September 30, 1955

[fol. 560b]

REX G. BUCKLEY
2545 Spring Street
South Charleston 3, W. Va.

GAS CHEMIST'S CERTIFICATE

Vessel: [illegible]
Type Vessel: Compartment Barge
Location: Kenova, W.Va.
Owner or Agent: Carbide & Carbon Chem.
Survey Requested by: Ashcroft Barge

Test Method: Davis Vaporometer
Last Cargo: Isopropanol
Date: 2 October 1955
Time of Completion: 10:30 AM
Certificate No. 27

[illegible] is an all welded steel barge having eight cargo compartments and two pump compartments.

This barge is SAFE FOR MEN - SAFE FOR FIRE. Adequate ventilation is to be provided to all compartments in which men are working.

STANDARD DESIGNATIONS:

1. SAFE FOR MEN - SAFE FOR FIRE: In the compartment so designated and in the adjacent compartments unless inerted, the gas content is within the permissible limits of the Standards and, in my judgment, the residues are not capable of producing dangerous gases under atmospheric conditions and in the presence of fire.
2. SAFE FOR MEN - NOT SAFE FOR FIRE: In the compartment so designated the gas content is within the permissible limits of the Standards and, in my judgment, the residues are not capable of producing dangerous gases under atmospheric conditions and in the absence of fire.
3. NOT SAFE FOR MEN - NOT SAFE FOR FIRE: In the compartment so designated the gas content is not within the permissible limits of the Standards or that, in my judgment, the residues are capable of producing dangerous gases under atmospheric conditions or that the compartment was not tested by me.

CHEMIST'S ENDORSEMENT:

This is to certify that I have examined the compartments noted in the foregoing list for cleanliness and have tested the atmosphere in each for gas content, and at the time of the inspection noted above found them to be as indicated in accordance with the STANDARDS FOR THE CONTROL OF GAS HAZARDS ON VESSELS TO BE REPAIRED adopted by The American Bureau of Shipping and National Fire Protection Association.

This certificate is based on conditions existing at the time the inspection herein set forth was completed. Transfer of ballast or manipulation of valves or closure equipment tending in my opinion to alter conditions in pipe lines, tanks or compartments subject to gas accumulation, or transfer of the vessel, unless specifically approved in this certificate, requires inspection and endorsement or reissue of certificate for the spaces so affected.

Signed: Rex G. Buckley

Certificate No. CC [illegible]

[fol. 560c]

COMPARTMENT BANK CC-20

INSPECTION PRIOR TO REPAIRS

DATE INSPECTED: 10-7-55

WHERE INSPECTED: Amherst Barge Company

IN OR OUT OF WATER: Out of water on marine ways

REASON FOR INSPECTION: Biannual drydocking, Coast Guard inspection, painting, and repair

INSPECTED BY: F. C. Pritchard

COAST GUARD INSPECTIONS REQUIRED: ANNUAL _____, BIENNIAL DRYDOCKING X

LIST OF WORK REQUIRED:

GAS FREE: By C & GSC

GAS FREE CERTIFICATE: By ship yard

DRYDOCK AND LAY DAYS: For owner's account

CLEANING AND PAINTING

HULL EXTERIOR: Apply "Bitotoxo - 3" and "Yankee Clipper" per specifications, dated September 30, 1955 prepared by Mr. J. L. Baxter

MARKINGS AND SIGNS

	Paint
Draft Marks:	*
Barge Number All Corners:	*
"Port Of South Charleston", on Opposite Corners:	*
Identification Sign on Deck or Cargo Piping:	*
Warning Sign:	*
Red Flag:	*
Compartment Nos. on expansion trunks	*

BOW RAKE INTERIOR:
Clean and apply "No-corode A Special" grease up to 2' - 0" level as required. Apply hot.

STERN RAKE INTERIOR:
Same as bow rake.

[fol. 560d]

VILLAGE OPENINGS (Screens, Gaskets, Hinge Bars, Etc.):
Renew all gaskets with neoprene

PRESSURE VACUUM RELIEF VALVES:
Open and inspect

FIRE EXTINGUISHERS:
Weigh both extinguishers

TESTING:
(To Be Witnessed or Approved By U.S.Coast Guard Inspector)
Apply 2 psi air pressure and test for leaks with soapsuds as follows:
Apply this to all product compartments and check all repair welds and tightness of new Butterworth openings.
Install ground wire -

Check following welds for leakage by application of water hose test:

1 - S Compartment
Tighten stem raising device in yoke of unloading valve for this compartment. Reweld No. 6 side longitudinal to No. 1 transverse truss

ADDITIONAL WORK:

1 - S Compartment
Tighten stem raising device in yoke of unloading valve for this compartment
Reweld No. 6 side longitudinal to No. 1 transverse truss.
No. 6 & 7 side longitudinal to No. 3 transverse truss

2 - P Compartment
Reweld No. 5 side longitudinal to No. 1 transverse truss.

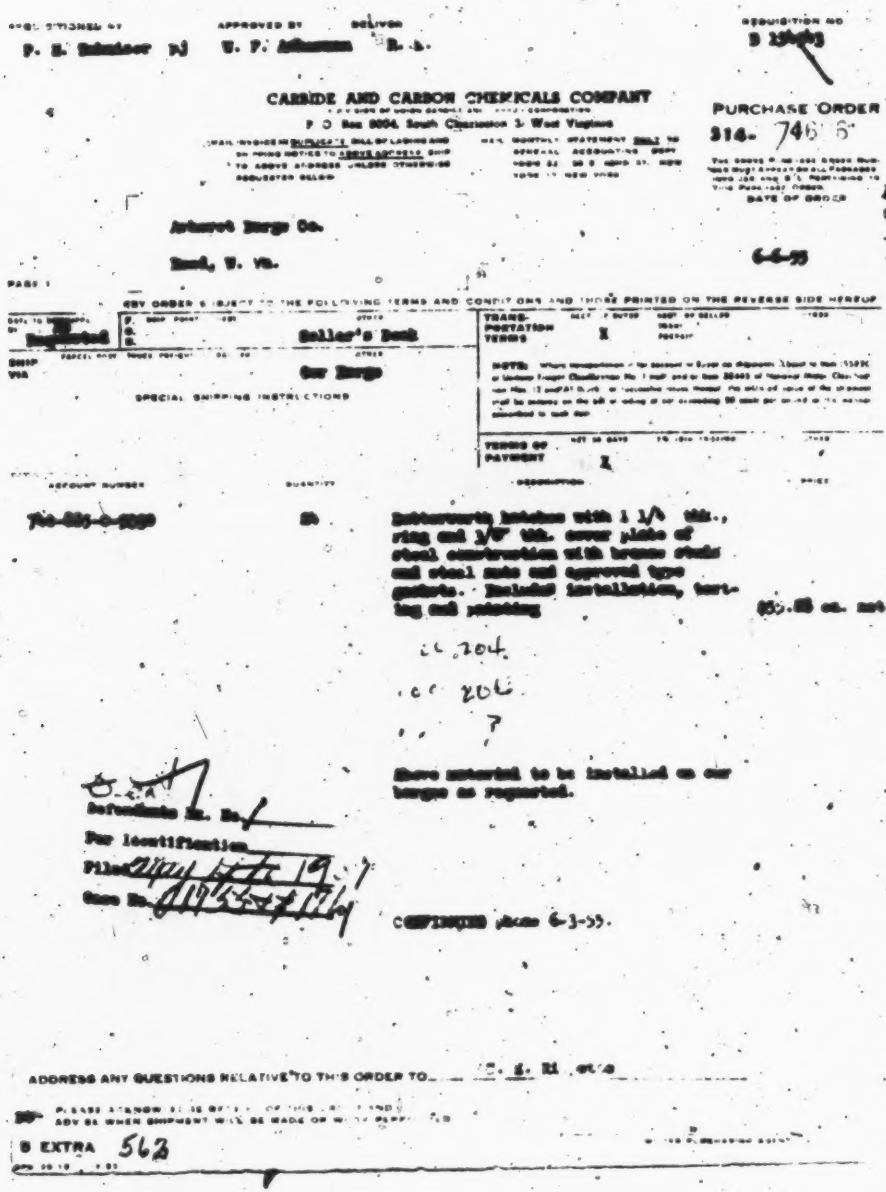
2 - S Compartment
Reweld Nos. 5, 6, and 7 side longitudinals to No. 2 transverse truss.
Grop and renew a section 12" x 3/8" x 1[illegible]" of gunwale located approximately 9' forward of bulkhead.

2 - P Compartment
No repairs required

3 - S Compartment
Reweld Nos. 6 and 7 side longitudinals to No. 3 transverse truss.
Reweld Nos.3 side longitudinals to No. 4 transverse truss.

[fol. 562]

DEFENDANT'S No. 1—EXHIBIT 1



P. E. Schindler NJ W. P. Adkerson B. A.

REQUISITION NO. B 15[illegible]

CARBIDE AND CARBON CHEMICALS COMPANY

P. O. Box 8004, South Charleston 3, West Virginia

PURCHASE ORDER

314- 746 6

DATE OF ORDER

Ashcraft Barge Co.

Kenova, W. Va.

6-6-55

PAGE 1

THIS ORDER IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS AND THOSE PRINTED ON THE REVERSE SIDE HEREOF

Seller's Dock

Our Barge

SPECIAL SHIPPING INSTRUCTIONS

TRANSPORTATION TERMS: X

TERMS OF PAYMENT: X

ACCOUNT NUMBER | QUANTITY | DESCRIPTION | PRICE

74-[illegible]-0-2000 | lb. | Interwrought bronze with 1 1/4 thk., ring and 1/8" thk. cover plate of steel construction with bronze studs and steel nuts and approved type gaskets. Included installation, testing and painting | $[illegible] est. net

cc 204

cc 206

" 7

Above material to be installed on our barges as requested.

Defendants Ex. No. 1

For Identification

Filed April 17th 1957

Case No. 4104 Civil

CONFIRMING phone 6-3-55.

ADDRESS ANY QUESTIONS RELATIVE TO THIS ORDER TO C. E. Bl[illegible]

PLEASE ACKNOWLEDGE RECEIPT OF THIS ORDER AND ADVISE WHEN SHIPMENT WILL BE MADE OR WHEN PERFORMED

B EXTRA 562

[fol. 563]

DEFENDANT'S NO. 1—EXHIBIT 2

REX G. BUCKLEY
2545 Spring Street
South Charleston 3, W. Va.

GAS CHEMIST'S CERTIFICATE

Vessel: CC-204
Type Vessel: Compartment Barge
Location: Reed, W.Va.
Owner or Agent: Carbide & Carbon Chem.
Survey Requested by: Amherst Barge

Test Method: Davis Vapotester
Last Cargo: Isopropanol
Date: 2 October 1955
Time of Completion: 10:30 AM
Certificate No. 37

CC-204 is an ann welded steel barge having eight cargo compartments and two rake compartments.

This barge is SAFE FOR MEN - SAFE FOR FIRE. Adequate ventilation is to be provided to all compartments in which men are working.

Defendant's Ex. No. 2
For Identification
Filed
Case No.

STANDARD DESIGNATIONS:

1. SAFE FOR MEN - SAFE FOR FIRE: In the compartment so designated and in the adjacent compartments unless inerted, the gas content is within the permissible limits of the Standards and, in my judgment, the residues are not capable of producing dangerous gases under atmospheric conditions and in the presence of fire.
2. SAFE FOR MEN - NOT SAFE FOR FIRE: In the compartment so designated the gas content is within the permissible limits of the Standards and, in my judgment, the residues are not capable of producing dangerous gases under atmospheric conditions and in the absence of fire.
3. NOT SAFE FOR MEN - NOT SAFE FOR FIRE: In the compartment so designated the gas content is not within the permissible limits of the Standards or that, in my judgment, the residues are capable of producing dangerous gases under atmospheric conditions or that the compartment was not tested by me.

CHEMIST'S INDORSEMENT:

This is to certify that I have examined the compartments noted in the foregoing list for cleanliness and have tested the atmosphere in each for gas content, and at the time of the inspection noted above found them to be as indicated in accordance with the STANDARDS FOR THE CONTROL OF GAS HAZARDS ON VESSELS TO BE REPAIRED adopted by The American Bureau of Shipping and National Fire Protection Association.

This certificate is based on conditions existing at the time the inspection herein set forth was completed. Transfer of ballast or manipulation of valves or closure equipment tending in my opinion to alter conditions in pipe lines, tanks or compartments subject to gas accumulation, or transfer of the vessel, unless specifically approved in this certificate, requires inspection and endorsement or reissue of certificate for the spaces so affected.

Signed: Rex G Buckley
Certificate No. CC 43

[fol. 564]

DEFENDANT'S NO. 1—EXHIBIT 3

Form No. V 3-1912

CERTIFICATE AMENDING CERTIFICATE OF INSPECTION BY CHANGING CHARACTER OF VESSEL, ROUTE, EQUIPMENT, ETC.

UNITED STATES COAST GUARD

MARINE INSPECTION OFFICE

PORT OF HUNTINGTON, WEST VIRGINIA

DATE 26 October 1955

This certifies, That the following-described amendments are hereby authorized in the certificate of inspection expiring on 2 APRIL, 1956, issued to the tank barge (Steam, motor, sail, or barge) vessel named CO-2th Off. No. - - of 593 gross tons, home port SOUTH CHARLESTON, WEST VIRGINIA classed as TANK BARGE (Passenger, freight, etc.) built at KEWAUNEE ISLAND in the State of PENNSYLVANIA, in the year 1948, and certificated at HUNTINGTON, in the State of WEST VIRGINIA namely:

VESSEL DRYDOCKED AT REED, WEST VIRGINIA

13 OCTOBER 1955

2-year survey completed
Subd. "F" Sec. 31.1-20 (a) (2)

W. E. FULLER, CHR., USCG
Acting Officer in Charge, Marine Inspection.

The original of this certificate will be delivered to the master or owner of the vessel to which it relates, which certificate must be framed under glass and posted on board near the certificate of inspection or examination, if the certificate of inspection or examination is required to be posted; or kept on board with the original certificate of inspection or examination, if the certificate of inspection or examination is not required to be posted, to be shown on demand.

One copy of this certificate will be delivered to the chief officer of customs of the district in which the copy of the original certificate of inspection or examination was filed.

One copy of this certificate will be filed with the copy of the certificate of inspection or examination that it amends in the office of the Officer in Charge, Marine Inspection.

Any additional equipments required must be stated herein.

[fol. 565]

DEFENDANT'S No. 1—EXHIBIT 4

FILE NO. 79 1958

This Certificate Expires 1 April, 1939

UNITED STATES OF AMERICA
TREASURY DEPARTMENT
UNITED STATES COAST GUARD

Certificate of Inspection

VESSEL ..... OFFICIAL NO. .....
CLASS ..... TONS: GROSS ..... NET ..... LENGTH .....
HOME PORT ..... OWNERS .....
OPERATORS .....

The inspection of the above-named vessel having been completed at ..... on the 1st day of April, 1938, I hereby CERTIFY that the said vessel was built at ..... in the State of ....., in the year ....., rebuilt in the year ....; that the hull is constructed of ....; is provided with ... staterooms, ... berths; that the said vessel at the date hereof is in all things in conformity with the applicable vessel inspection laws and the rules and regulations prescribed thereunder; and is allowed to carry ... passengers, ... persons in addition to the crew.

The following complement of licensed officers and crew is required to be carried, included in which there must be ... certificated lifeboatmen: UNMANNED

..... Master	..... Second Mate	..... Able Seamen	..... Chief Engineer	..... Pursers/Pharmacists
..... 1st Class Pilot	..... Third Mate	..... Ordinary Seamen	..... 1st Assistant Engineer	..... Others
..... 2d Class Pilot	..... Second Mate	..... Watchmen	..... 2d Assistant Engineer	..... Radiotelephone Operators
..... Chief Mate	..... Radio Officer	..... Firemen	..... 3d Assistant Engineer	

and also may carry ... persons whom needed in the steward's and other departments not connected with the navigation of the vessel. Total number of persons allowed ...

[illegible] Mr. Bo[illegible]
[illegible]tion

The said vessel is permitted to be navigated for one year on RIVERS ISLAND DATES IN NEARNESS TO THE GULF OF MEXICO

..... Wooden lifeboats for ..... persons	..... Fire extinguishers, Class A	Stability letter dated	.....
..... Metal lifeboats for ..... persons	1 Fire extinguishers, Class B 12	Date stability letter dated 29 May 1933	Number ..... Year built .....
..... Motor lifeboats for ..... persons	..... Fire extinguishers, Class C	Propelled by	Kind .....
..... Working boats for ..... persons	..... Fire extinguishers, Semiportable	Net check tonnage	Maximum allowance of overload temporarily .....
..... Liferafts for ..... persons	Size	.....	..... persons
..... Buoyant apparatus for ..... persons	..... Fire extinguishers, Fixed	.....	Bunkers in After .....
..... Life preservers, adult's	.....	Pressure vessels examined	Bunkers vented .....
..... Life preservers, children's	.....	.....	.....
..... Wood floats	..... Fire axes ..... Fire pumps	.....	Bunkers secured .....
..... Oars, fire-fighting apparatus	Fire hose and nozzles required by law to be carried:	Pilot	.....
	.....	.....	Date hydrostatic pressure applied .....
	Fire hose and nozzles carried: 4 (not to exceed one fifth and lower strake)	.....	Maximum steam pressure allowed .....
	.....	.....	
	Capacity in barrels 5,400	.....	

STATE OF WEST VIRGINIA
PORT OF CHARLESTON } ss:

/s/ T. E. TILLIS, Lt. Com., U.S.C.G.
(Officer in Charge, Marine Inspection)

Subscribed and sworn to before me this 9th day of April, 1938, by T. E. TILLIS
(Owner or officer) (Officer in Charge, Marine Inspection)

/s/
T. E. TILLIS, Lt. Com., USCG
Authority, 46 U.S.C. 738

[fol. 577]

DEFENDANT'S NO. 2—EXHIBIT 5-A

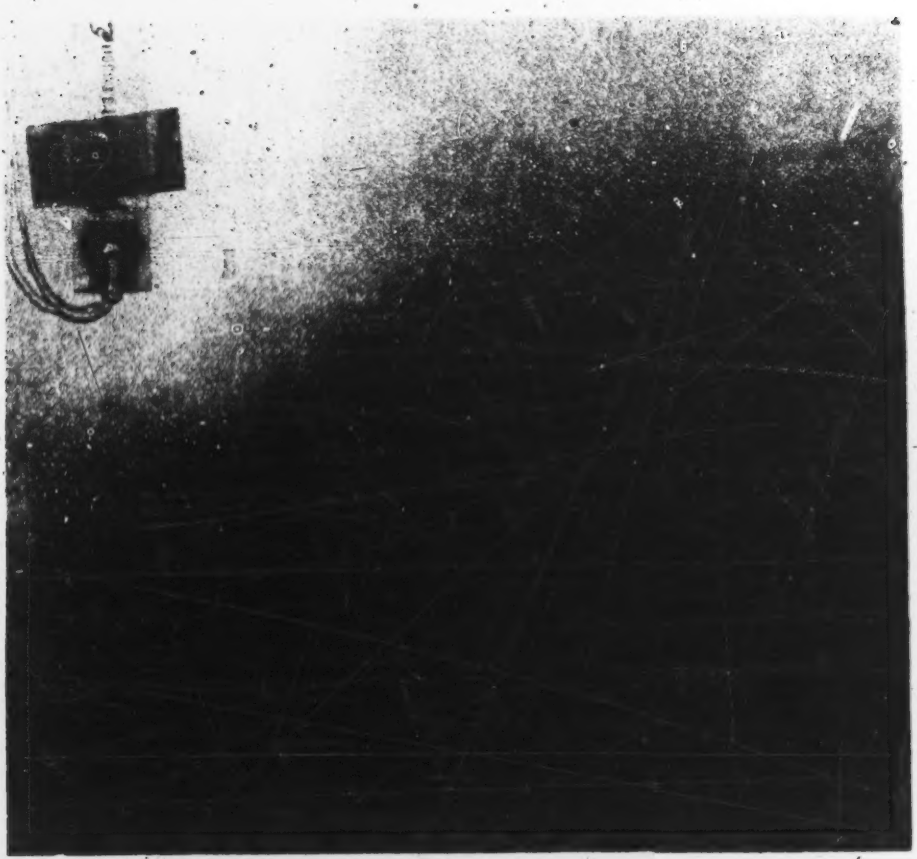
Night. The tow rides down a river engraved in the pilot's mind. The bright pinpoint of a river light, the shadow of a hill barely discernible—these are his landmarks. The rest is memory and knowledge. On the barges the deckhands work in the beam of a searchlight.

[fol. 578]

DEFENDANT'S NO. 2—EXHIBIT 5-B

[fol. 579]

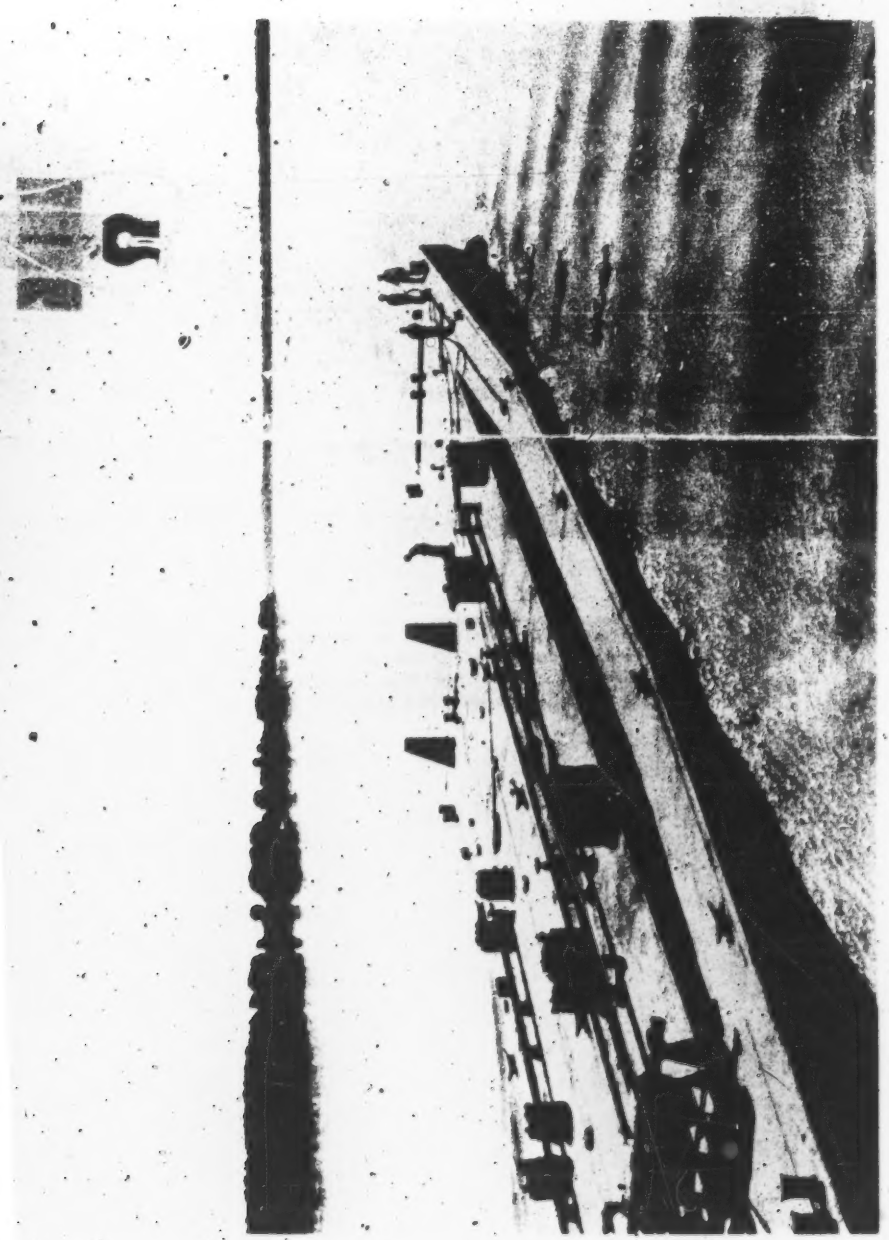
DEFENDANT'S NO. 2—EXHIBIT 5-C



Storm. These three pictures were taken in sequence as a rainstorm enveloped a tow on the Mississippi. Less than five minutes from unlimited visibility to complete blindness.

[fols. 580, 581]

DEFENDANT'S NO. 2—EXHIBIT 5-D



[fol. 582]

On the boats and on the barges the men and women live and work, for months at a time, from port of origin back to port of origin. Ashore people may be having holidays and ball games. For the riverman it's work from the moment he leaves home, work all week and no Sundays.

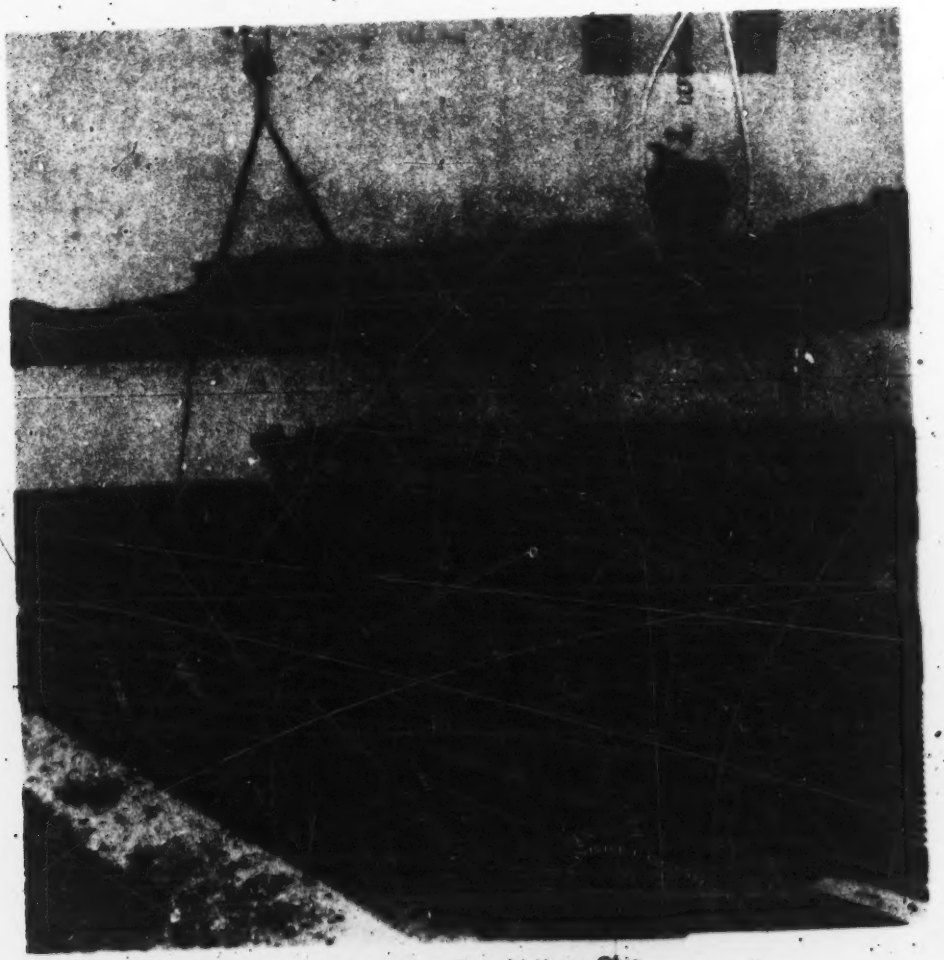
[fol. 583]

DEFENDANT'S NO. 2—EXHIBIT 5-E

The controlled river: A coal tow enters a lock.

[fol. 584]

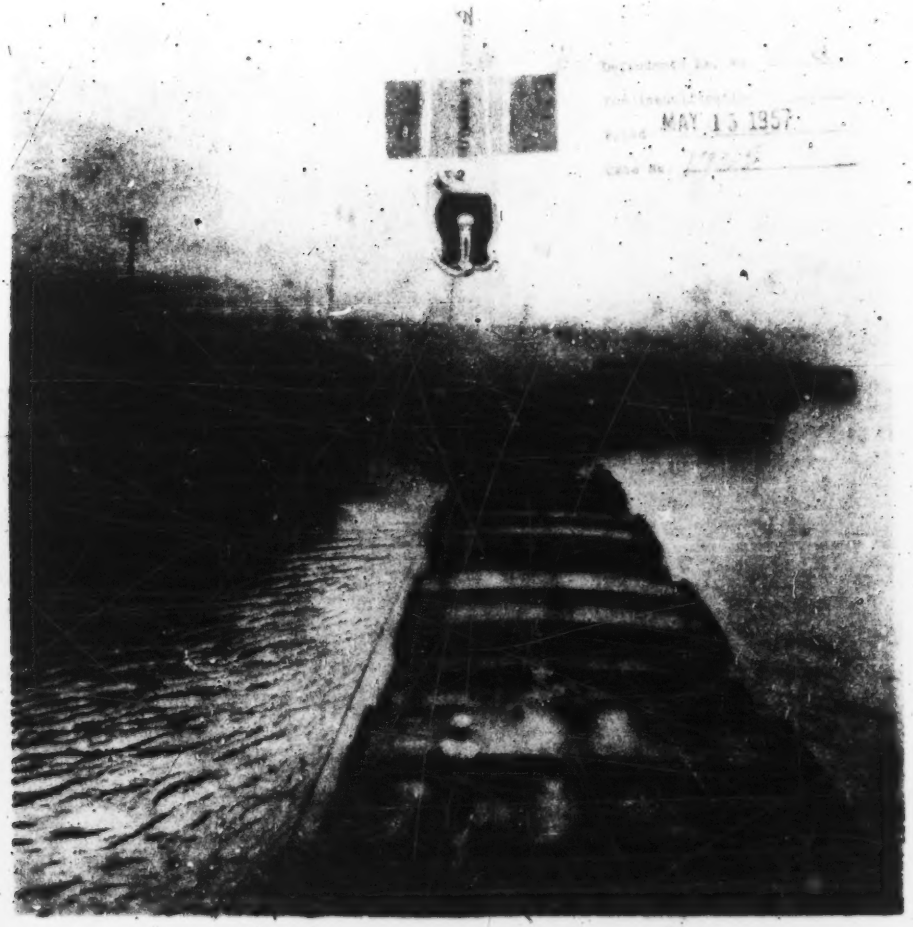
DEFENDANT'S NO. 2—EXHIBIT 5-F



Loading oil-drilling pipe and casing at a steel mill on the Upper Ohio.

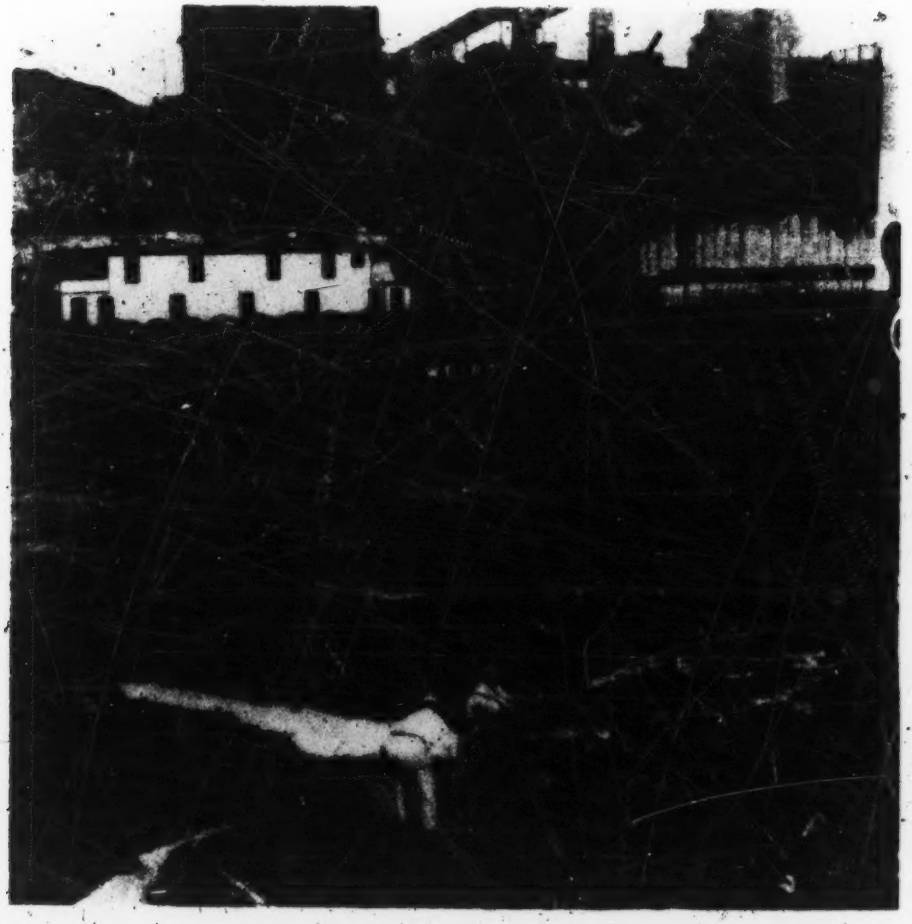
[fol. 585]

DEFENDANT'S NO. 2—EXHIBIT 5-G



[fol. 586]

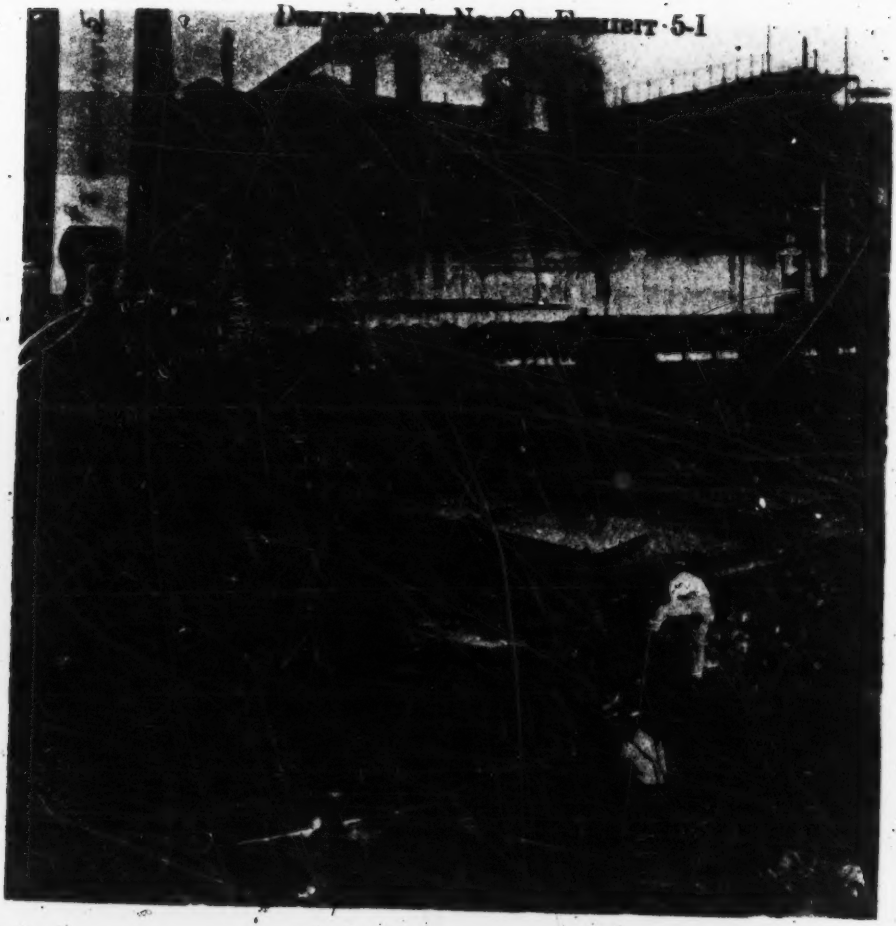
DEFENDANT'S NO. 2—EXHIBIT 5-H



Watch out, she's comin' fast. The deckhand has tossed a line over the timberhead of a barge being picked up at a landing. Make that line fast quick. No time for mistakes. Once you get a barge moving, its great weight is hard to stop for a moment.

[fol. 587]

EXHIBIT 5-I



A few seconds later. The line is taut, the barge at rest. It's still no plaything. In spite of his steamboat figure, the mate scrambles up the side of the barge before it eases fully alongside. That's quite a jump from a loaded oil barge to an empty cargo barge, six feet anyway.

[fols. 588-589]

DEFENDANT'S NO. 2—EXHIBIT 5-J

[fol. 590]

DEFENDANT'S No. 2—EXHIBIT 5-K

Defendants Ex. No. 5-K
For Identification
Filed MAY 15 1957
Case No. 1755

Three tows in a tight place on the Ohio.

[fol. 591]

Defendant's No. 2—Exhibit 5

A close bend on the Big Kanawha.

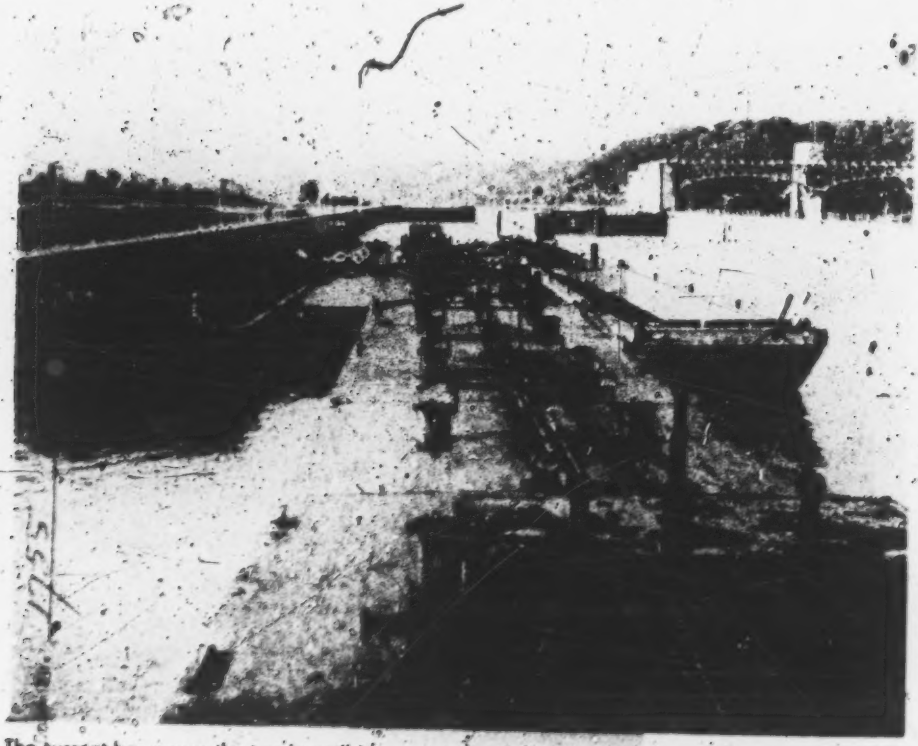
[fol. 592]

DEFENDANT'S NO. 2—EXHIBIT 5-M

Getting in shape for a lock; the tow seems to be heading over the dam.

[fol. 593]

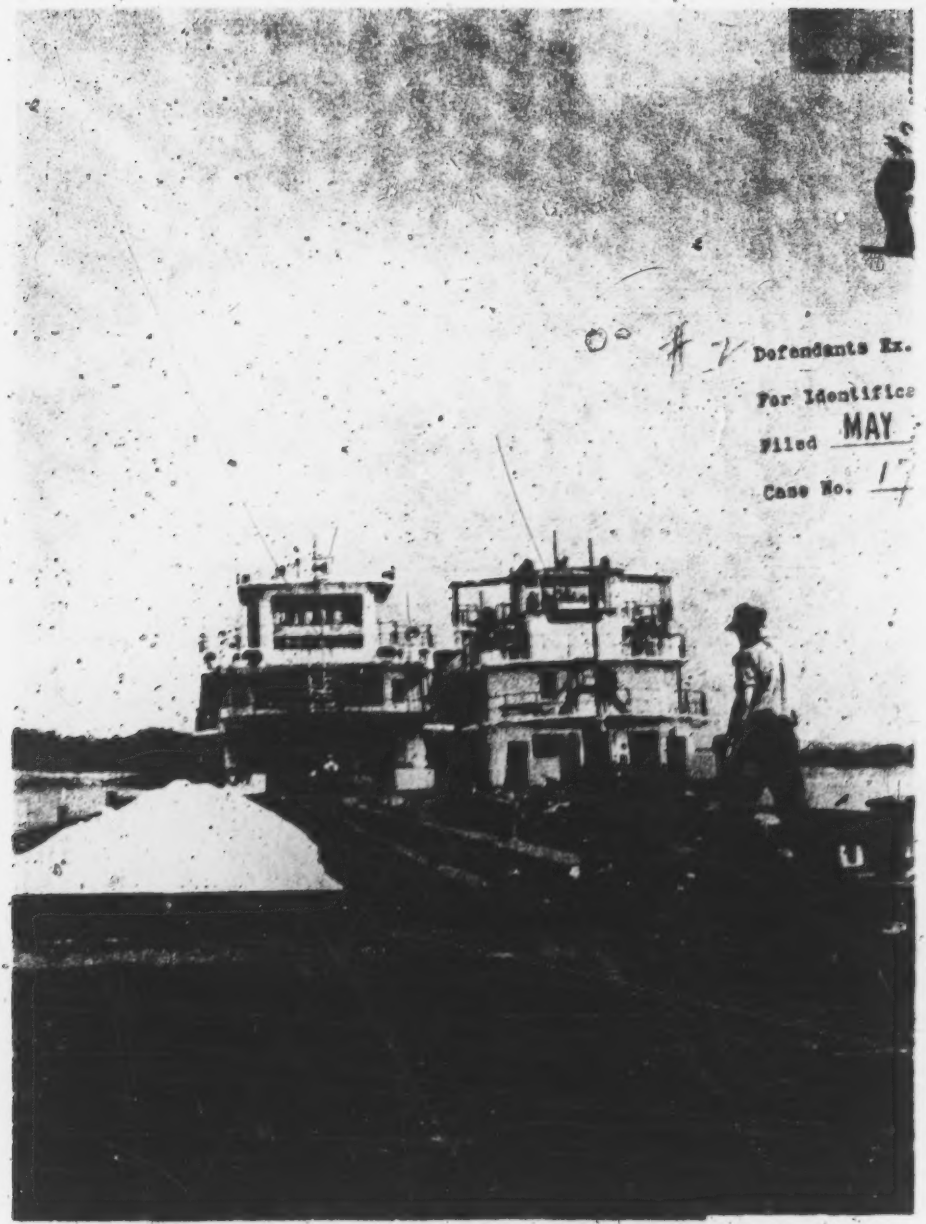
DEFENDANT'S NO. 2—EXHIBIT 5-N



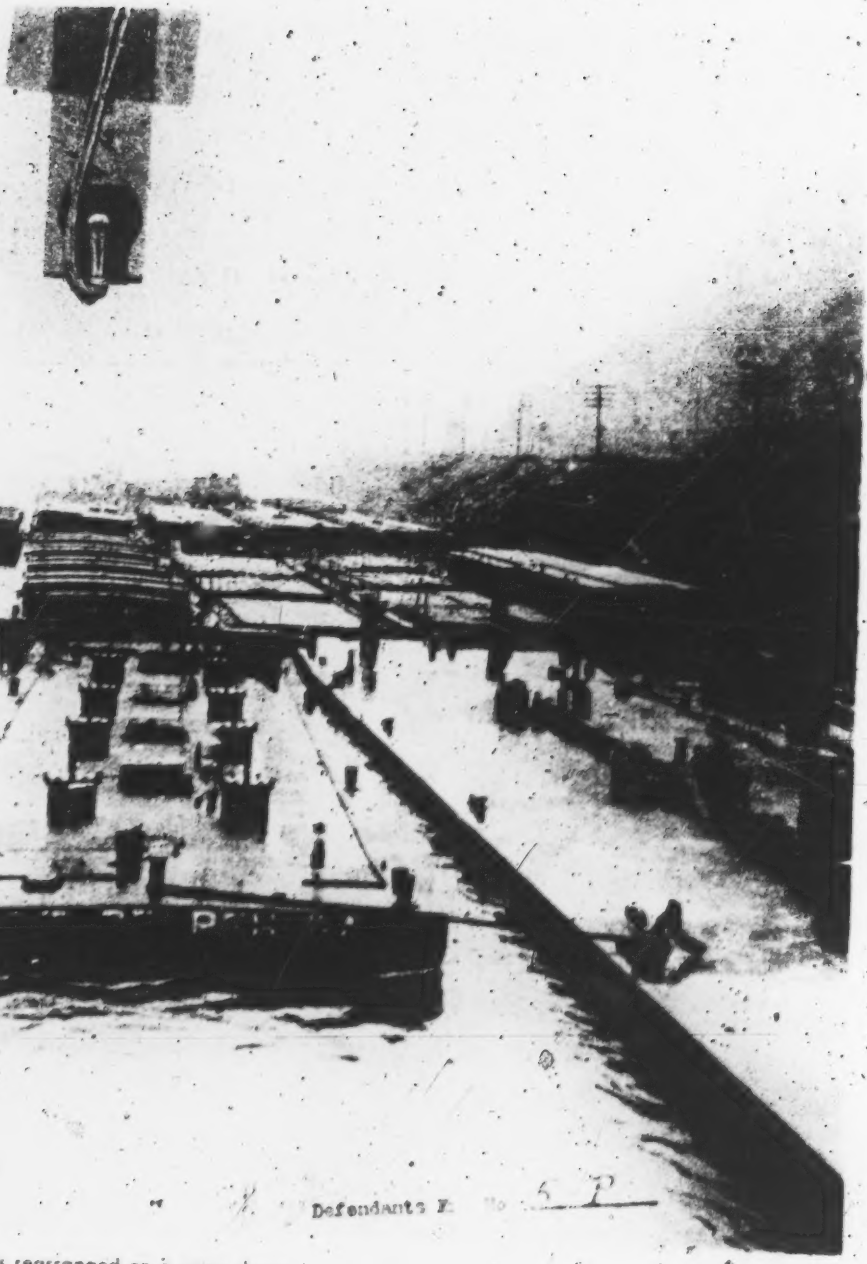
The current has swung the tow in until it rests against the guidewall.

[fol. 594]

DEFENDANT'S NO. 2—EXHIBIT 5-O



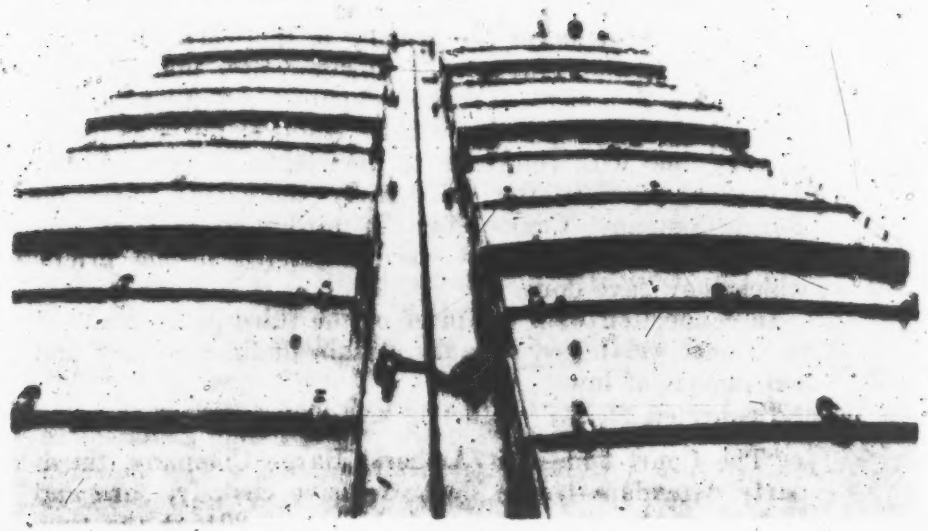
Two boats combine to shove a heavy tow upstream through a bad place.



Defendants E

A tow is rearranged on a rainy down.

Ex. No.
Plaintiff
JUL 15 1957



The white blindness, fog.

[fol. 597] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—June 24, 1957

June 24, 1957

Bluefield, West Virginia

Harvey Goldstein, Esq.,
Attorney at Law,
220 Broadway,
New York 38, New York

E. Franklin Pauley, Esq.,
Attorney at Law,
Charleston, West Virginia

Charles M. Love, Esq.,
Attorney at Law,
Charleston, West Virginia

William T. O'Farrell, Esq.,
Attorney at Law,
Charleston, West Virginia

In re: Goett, Admx. v. Union Carbide & Carbon Corp., v. Amherst Barge Company, a Corp.
Civil Action No. 1755

Gentlemen:

At the conclusion of the hearing in this case which was tried by the Court as a case in admiralty, plaintiff was awarded a judgment of $20,000 against defendant Union Carbide & Carbon Corporation. No decision was made at that time with reference to the rights, if any, of that defendant against the third-party defendant, Amherst Barge Company. Counsel for the third-party plaintiff and the third-party defendant were requested to file briefs, which they have done.

In connection with the brief of the third-party plaintiff the Court was asked to make certain findings of fact and conclusions of law.

Requested finding of fact is as follows:

"The Court finds that Amherst Barge Company, third-party defendant herein, had exclusive custody, care and control of the unmanned tank barge CC-204 at the time Mr. Goett, plaintiff's decedent, fell therefrom."

I now make this finding of fact, deleting therefrom however the word "unmanned," since it is my opinion that the barge was not at the time an unmanned barge.

Other requested findings, which I deem to be findings of fact but which are requested as conclusions of law, are to the effect that the third-party defendant was negligent [fol. 598] in not furnishing a life jacket to Mr. Goett and requiring him to wear it while performing his work; and in not erecting stanchions or railing around the edge of the deck of the barge.

I have already found as a fact that no negligent act of the third-party defendant contributed proximately to cause the death of Mr. Goett. I now further find as a fact that under all the circumstances disclosed by the evidence the third-party defendant was not negligent in not furnishing the life jacket and requiring Goett to wear it. I further find that while the preponderance of the evidence, in my opinion, did not show that the absence of stanchions or railing contributed proximately to Goett's death, the third-party plaintiff, and not the third-party defendant, was negligent in not erecting such stanchions or railing.

Having made these findings of fact, counsel are advised that I have carefully considered the briefs submitted to me, the authorities cited, and the arguments made; and my conclusion of law is that there is no liability from the third-party defendant to the third-party plaintiff arising out of the judgment herein awarded to plaintiff Ellen Goett, Administratrix, etc., against defendant Union Carbide & Carbon Corporation.

It is suggested in the brief of the third-party plaintiff that the court may wish to hear evidence as to whether or not Amherst purchased the insurance required by its contract with Carbide.

I am of opinion that the contract is not in any sense ambiguous, and further, that it is immaterial to the decision of the present controversy whether Amherst did or did not purchase such insurance.

An order may be entered in accordance with the views expressed in this letter.

Yours truly,

Ben Moore, United States District Judge.

[fol. 599] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Civil Action No. 1755

ELLEN GOETT, as Administratrix of the Estate of Marvin Paul Goett, Deceased, Plaintiff,

v.

UNION CARBIDE & CARBON CORPORATION, a corporation, Defendant,

v.

AMHERST BARGE COMPANY, a corporation, Third-Party Defendant.

JUDGMENT—August 24, 1957.

On the 13th day of May, 1957, came the plaintiff, in the above entitled action, in person and by E. Franklin Pauley, Harvey Goldstein, and S. Eldridge Sampliner, her attorneys, and came the defendant by Charles M. Love, its attorney, and came the third-party defendant by W. T. O'Farrell and D. D. Johnson, its attorneys. Whereupon on motion of plaintiff's attorneys, it was ordered that this action be, and it thereupon was, transferred from the civil side to the admiralty side of this Court; to which said motion and to which order of the Court the defendant and the third-party defendant did object and except.

Thereupon, this action came on regularly for trial before the Court, in Admiralty, without a jury, on said 13th day of May, 1957, at Charleston, West Virginia, and the plaintiff appearing in person and by her attorneys, as aforesaid, and the defendant and third-party defendant appearing by their attorneys, as aforesaid, and testimony having been offered on behalf of all parties and argument made by the respective attorneys for all of said parties.

the Court did, at the conclusion of said trial on the 15th day of May, 1957, make certain findings of fact and conclusions of law which were announced orally by the Court from the bench, as appears from the official transcript of said trial, which said findings of fact and conclusions of law are hereby filed herein by order of the [fol. 600] Court and made a part hereof, and is adopted as the Court's finding of fact and conclusions of law.

The rendition of judgment herein being deferred pending determination by the Court of liability between the defendant and the third-party defendant.

Thereupon the Court did take additional time to consider the matters and things raised herein by and between the said defendant and the said third-party defendant, and after considering the arguments made and the briefs filed by the respective attorneys for said parties with respect thereto, the Court did make certain additional findings of fact and conclusions of law which are set forth in the Court's memorandum opinion in the form of a letter under date of June 24, 1957, which said memorandum opinion is hereby filed herein by order of the Court and made a part hereof, and is adopted as the Court's finding of fact and conclusions of law.

And, on this 24th day of August, 1957, came the plaintiff by E. Franklin Pauley, her attorney, and came the defendant by Charles M. Love, its attorney and came the third-party defendant by David D. Johnson, its attorney; and pursuant to the said findings of fact and conclusions of law made by the Court at the conclusion of the trial herein, and pursuant to said additional findings of fact and conclusions of law embodied in said memorandum opinion of June 24, 1957, it is hereby Ordered and Adjudged:

1. That the plaintiff recover from the defendant, Union Carbide and Carbon Corporation, a corporation, the sum of Twenty Thousand Dollars ($20,000.00), with interest thereon from the 15th day of May, 1957, together with her taxable costs in this behalf expended.

2. That the defendant, Union Carbide and Carbon Corporation, a corporation, take nothing from the third-party defendant, Amherst Barge Company, a corporation, and [fol. 601] that the said third-party defendant recover from Union Carbide and Carbon Corporation, a corporation, its taxable costs in this behalf expended.

To the recovery by the plaintiff herein against the defendant, the defendant and third-party defendant do object and except;

To the limitation of the recovery herein to the sum of Twenty Thousand Dollars ($20,000.00), the plaintiff does object and except; and,

To the refusal of recovery by the defendant against the third-party defendant, the defendant does object and except.

Enter: August 24, 1957.

Ben Moore, United States District Judge.

Inspected by: E. Franklin Pauley, Attorney for Plaintiff; Charles M. Love, Attorney for Defendant; David D. Johnson, Attorney for Third-Party Defendant.

[fol. 602]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7588.

UNION CARBIDE CORPORATION, a corporation, Defendant and Third Party Plaintiff below, Appellant and Cross-Appellee,

versus

ELLEN GOETT, As Administratrix of the Estate of Marvin Paul Goett, deceased, Plaintiff below, Appellee and Cross-Appellant,

and

AMHERST BARGE COMPANY, a corporation, Third Party Defendant below, Appellee.

Cross-Appeals from the United States District Court for the Southern District of West Virginia, at Charleston.

Argued April 9, 1958.

Before Sobeloff, Chief Judge, Soper, Circuit Judge, and Thomsen, District Judge.

Charles M. Love (Dayton, Campbell & Love, and Charles R. McElwee on brief) for Union Carbide Corporation, [fol. 603] Appellant and Cross-Appellee; Harvey Goldstein (E. Franklin Pauley and S. Eldridge Sampliner on brief) for Ellen Goett, as Administratrix etc., Appellee and Cross-Appellant; and David D. Johnson (Jackson, Kelly, Holt & O'Farrell, and W. T. O'Farrell on brief) for Amherst Barge Company, Appellee.

OPINION—Decided May 27, 1958

THOMSEN, District Judge:

Marvin Paul Goett, an employee of Amherst Barge Company, while sandblasting a tank barge owned by Union

Carbide & Carbon Corporation, fell into the Kanawha River and was drowned. The barge had been turned over to Amherst for repairs and improvements and was under its sole control. Since the barge was an unmanned barge, it had no life rings or other rescue equipment. The principal question to be decided on this appeal is whether Carbide is liable to Goett's administratrix either for negligence or unseaworthiness because the barge was not so equipped.

Carbide was the owner of the CC-204, an unmanned steel tank barge, with a flat deck. Except for pipe lines it had no superstructure of any kind, but there were kevels along the outer edges of the deck to assist in mooring. It had no railing around its deck and was not equipped with any life rings or similar rescue equipment. Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys,[1] and it is not customary for such barges to be so equipped. The barge and its equipment had been inspected, certified and approved by the Coast Guard; [fol. 604] the certificate of inspection issued on April 1, 1955, granted permission for navigation as an unmanned tank barge on rivers and inland waters tributary to the Gulf of Mexico, approved for use without equipment other than fire extinguishers.

Amherst owns and operates a repair dock, with marine ways on the Kanawha River at Reed, West Virginia. In October, 1955, Carbide contracted with Amherst for a biennial drydocking, certain welding, repairs and improvements to the barge, including installation of twenty-four Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides, with preparation for the painting by means of sandblasting. The work was to be done in accordance with Carbide's written specifications. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications.

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[1] 14 U.S.C.A. 63; 46 C.F.R. 31.15-5, 32.01-10, 33.40-5 (now 33.40-10).

In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 2. Carbide's supervisor of barge maintenance went on board the barge on the following day with Amherst's maintenance superintendent, to point out and discuss the work that was to be done.

No officer, crewman, watchman or other person employed by Carbide was left on or with the barge after it was delivered to Amherst; it was in the exclusive care, custody and control of Amherst on October 5, when Goett was drowned. The barge was then afloat on the Kanawha River, lying along shore, near Amherst's marine ways; it was [fol. 605] moored to and against the head of a digger boat, which lay downstream from the barge. The digger boat was attached to the shore by a semi-permanent ramp, which was the means of access to the barge from the shore. A ring-type life buoy with a line attached was mounted on the digger boat.

Goett, an employee of Amherst, while sandblasting the deck surface of the barge, fell into the Kanawha River and was drowned. He had been on the barge on October 4 to move the sandblasting equipment aboard, and began work in the morning of October 5. The sandblasting equipment consisted of a heavy machine sitting on the deck of the barge, but movable from place to place, with two hoses leading from the machine. Goett was holding the nozzle of one of the hoses in his hands, and was directing the sandblast against the surface of the deck while he walked slowly across it. He was wearing a canvas hood over his head and shoulders to protect him against flying sand from the sandblaster and was also wearing a respirator. He was not wearing a life-jacket, although life jackets were available in Amherst's supply house to any employee who desired to wear one while at work. The great majority of Amherst's employees preferred not to wear life jackets, and they were not required to do so. When last seen on the barge, Goett was walking slowly backward towards a kevel at the outboard edge of the barge. A minute later Goett's fellow workmen on the barge heard the noise of the nozzle thrashing against the side, ran to the edge of the barge and looked over. Goett was in the river, just outboard of the position

in which he was last seen on the barge. Three men immediately went into the river to save him, but Goett fought them off and prevented them from keeping a grip on him. After several minutes he slipped beneath the surface and was drowned. About that time, Amherst's maintenance superin- [fol. 606] tendent arrived on the scene and threw a life buoy off the digger boat into the water, but it was too late.

Goett's administratrix filed a civil action against Carbide in the Southern District of West Virginia based upon the West Virginia Wrongful Death Statute,[2] alleging that

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[2] W. Va. Code, 1955: "§ 5474. [5] Action for Wrongful Death—Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his death. * * *"

"§ 5475. [6] Party Plaintiff in Such Action; Damages; Distribution; Limitation.—Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate, left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just not exceeding ten thousand dollars: Provided, however, if the plaintiff in such action shall prove by a preponderance of the evidence financial or pecuniary loss sustained by a distributee or distributees of such deceased person in an amount exceeding the sum of ten thousand dollars the jury may give such damages as shall equal such financial or pecuniary loss, not exceeding twenty thousand dollars as the total of all damages recoverable in such action, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. Every such action shall be commenced within two years after the death of such deceased person."

"§ 5477. [8] When Action Not to Abate; Survival of Action for Personal Injury against Wrongdoer; Time Within Such Action Must Be Brought.—Where an action is brought by a person injured

Goett's death was due to the failure of Carbide to have rescue equipment aboard the barge. Carbide brought in Amherst as a third party defendant, alleging that by express and implied contract, it was entitled to indemnity. Answers were filed by Carbide and by Amherst, denying liability and raising the defenses of contributory negligence and assumption of risk. On plaintiff's motion, over the objection of Carbide and Amherst, the case was transferred to the admiralty side of the court.

The district judge found as facts: that Carbide should have foreseen that many of Amherst's employees would work on the barge; that under these circumstances it was [fol. 607] negligence for Carbide not to equip the barge with safety and rescue equipment; that the barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used, that failure to provide rescue equipment was the proximate cause of Goett's death; and that Amherst had exclusive custody, care and control of the barge at the time Goett fell therefrom.

The judge concluded: "this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown * * *"; that it was the duty of Carbide to furnish workmen who worked on the barge a safe place to work; and to that end to provide safety equipment, such as life lines or stanchions, to prevent their falling off the unprotected deck; that it was also the duty of Carbide to provide reasonably suitable rescue equipment, and to place such equipment in a position on the barge where it would be immediately available in case of need; that Goett was not guilty of any negligence contributing to his death; that Goett did not assume the risk of the failure of Carbide to have rescue

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for damage caused by the wrongful act, neglect or default of any person or corporation, and the person injured dies pending the action, the action shall not abate by reason of his death but, his death being suggested, it may be revived in the name of his personal representative, and the declaration and other pleadings shall be amended so as to conform to an action under sections five and six of this article, and the case proceeded with as if the action had been brought under said sections. But in such case there shall be but one recovery for the same injury. * * *"

equipment available; that plaintiff is entitled to recover $20,000 against Carbide, but that if the limitation in the West Virginia Wrongful Death Act did not apply, plaintiff would have been entitled to recover $50,000; and that Carbide is not entitled to indemnity from Amherst.

[fol. 608] The maritime law does not allow recovery for wrongful death. *The Harrisburg*, 119 U.S. 199. In 1920 Congress adopted an act to provide a remedy for wrongful death on the high seas, 46 U.S.C.A. 761 et seq., but there is no similar act where the death occurs on inland waters, unless the claim is against the employer of a deceased seaman and therefore covered by the Jones Act, 46 U.S.C.A. 688. The Supreme Court has held, however, that "where death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given." *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 242; *Levinson* v. *Deupree*, 345 U.S. 648, 650. The West Virginia Wrongful Death Act, like other statutes patterned on Lord Campbell's Act, has created a new cause of action for the benefit of certain named beneficiaries, and has not perpetuated the cause of action which the deceased had before his death. *Dunsmore* v. *Hartman*, 140 W. Va. 357, 84 S.E. 2d 137; *Gulf, C & S. F. T. Co.* v. *McGinnis*, 228 U.S. 173; *Continental Casualty Co.* v. *The Benny Skou*, 4 Cir., 200 F.2d 246, 248, *cert. den.* 345 U.S. 992.

The right to maintain such a suit can be enforced in admiralty only in accordance with the substantive law of the state whose statute is being adopted. The endowment must [fol. 609] be taken *cum onere*. *The Harrisburg; Levinson* v. *Deupree; Continental Casualty Co.* v. *The Benny Skou; Garrett* v. *Moore-McCormack Co., Inc.*, 317 U.S. 239, 245; *Curtis* v. *A. Garcia y Cia*, 3 Cir., 241 F.2d 30, 35. It has been generally held that any limitations in the state statute as to when suit must be brought, or the amount and character of damages which may be allowed, are binding on the admiralty court. See e.g. *Western Fuel Co.* v. *Garcia; Continental Casualty Co.* v. *The Benny Skou; Quinette* v. *Bisso*, 5 Cir., 136 F. 825, *cert. den.* 199 U.S. 606. A cause of

action for damages accrued prior to a decedent's death, whether based on unseaworthiness or on negligence, will survive if the applicable state statute so provides. *Kernan* v. *American Dredging Co.*, 355 U.S. 426, at 430, n. 4; *Curtis* v. *A. Garcia y Cia; Holland* v. *Steag, Inc.*, D.Mass., 143 F. Supp. 203; *Meade* v. *Lukseffjell*, S.D.N.Y., 148 F. Supp. 708; Cf. *Cox* v. *Roth*, 348 U.S. 207; *Just* v. *Chambers*, 312 U.S. 383. Unlike statutes in some states, the pertinent West Virginia statute permits such survival only if an action has been commenced before the decedent's death, and requires that such action be conformed to an action for wrongful death. W. Va. Code, 1955, § 5477. [8]; *Railing* v. *Case*, N.D.W.Va., 131 F. Supp. 754; *Alloy* v. *Hennis Freight Lines*, 139 W. Va. 480, 80 S.E.2d 514. Of course, no such action was filed by Goett.

In the instant case liability for Goett's death is claimed on the basis both of unseaworthiness and of negligence.

A. There is a division of opinion whether a suit under a statute like the West Virginia Wrongful Death Act can be based on unseaworthiness. Cf. *Lee* v. *Pure Oil*, 6 Cir., 218 F.2d 711, 714, and *Graham* v. *A. Lusi, Ltd.*, 5 Cir., 206 F.2d 223, with *Halecki* v. *United New York*, 2 Cir., 251 [fol. 610] F.2d 708, and *Skorgaard* v. *The M/V Tungus*, 3 Cir., 252 F.2d 14, noting the strong dissents in both *Halecki* and *Skorgaard*. See also *Kernan* v. *American Dredging Co.*

It is not necessary for us to decide whether a suit in admiralty under the West Virginia Act can ever be based upon unseaworthiness, because Goett was not a person to whom the warranty of seaworthiness ran, and because we do not agree with the finding of the district judge that the barge was unseaworthy.

The right to sue for injuries caused by unseaworthiness, which seamen have had since *The Osceola*, 189 U.S. 158, was extended to stevedores in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 99, because they were "doing a seaman's work and incurring a seaman's hazards", and to carpenters in *Pope & Talbot* v. *Hawn*, 346 U.S. 400, 413, because: "The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from un-

seaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law." See also *Alaska S.S. Co.* v. *Petterson*, 347 U.S. 396, and *Rogers* v. *United States Lines*, 347 U.S. 984. We extended the right to a watchman, supplied by an independent contractor, who was doing work customarily done by an officer or member of the crew. *Ross* v. *The Zeeland*, 4 Cir., 240 F.2d 820.

Since the decision below, however, this court has adopted the opinion of Judge Chesnut in *Raidy* v. *United States*, [fol. 611] D.Md., 153 F. Supp. 777, aff'd, 4 Cir., 252 F.2d 117, wherein he noted that the admiralty doctrine of unseaworthiness sprang from a consideration of the particular hazards affecting the crew of a ship in navigation. Raidy was a shipyard worker who was performing duties not within the competence or the customary activities of the crew. The ship was in drydock for structural changes; she was not subject to any of the perils of navigation. The crew had been discharged. The owner maintained no control over the work being done by the independent contractor other than the right to inspect to determine whether the structural changes were being performed in accordance with the specifications. We concluded that Raidy's status was very different from that of a seaman and that it was a "misnomer" to speak of the removable and absent footplate through which he fell as "unseaworthiness of the ship." 252 F.2d at 118. See also *Berryhill* v. *Pacific*, 9 Cir., 238 F.2d 385, *cert. den.* 354 U.S. 938; *West* v. *United States*, E.D.Pa., 143 F. Supp. 473; *Berge* v. *National Bulk Carriers*, 2 Cir., 251 F.2d 717. Cf. *Halecki* v. *United New York* and *Skovgaard* v. *The M/V Tungus*.

In *Sieracki*, *Hawn* and *Petterson*, the vessels were in the general control of their officers, loading cargo, when the longshoremen and carpenters were hurt. Those cases hold that an owner's duty to provide a seaworthy vessel, with appurtenant supplies and equipment, is not affected by the relinquishment to another, such as a stevedoring company, of control of a portion of the ship or of a particular opera-

tion, such as loading.[3] In the instant case, however, the barge had been temporarily withdrawn from navigation and delivered into the sole custody and control of Amherst, [fol. 612] the drydock company. While in extent the work was not as great as in *Berryhill*, *Berge* and *Raidy*, in character it was the same, because it could not be done by the regular crew, but required that the vessel be withdrawn from navigation and turned over to a drydock company having special facilities and equipment for the work. The work order called for drydocking of the vessel; without such drydocking the bottom and sides of the barge would have been inaccessible. The warranty of seaworthiness does not apply in that situation.

The barge was not unseaworthy. In its ordinary operations, it was unmanned, and did not require life saving equipment. It did not become unseaworthy when men went aboard after it had been turned over to a repair yard under the circumstances of this case. *Lester* v. *United States*, 2 Cir., 234 F.2d 625, *cert. den.* 352 U.S. 889.

B. Nor was Carbide negligent in delivering the barge to Amherst without mounting life rings or other safety equipment on the barge, or in failing to rescue Goett after he fell into the river, as contended by his administratrix. There is, of course, a duty on a vessel and her owners to have life saving equipment available to rescue members of her crew who fall overboard while the vessel is in operation. *Sadler* v. *Pennsylvania*, 4 Cir., 159 F.2d 784, and cases cited. A similar duty is owed to business visitors who come aboard while the vessel is in the custody and control of her officers or other representatives of the owners. But in the instant case Carbide had delivered the barge into the sole custody and control of Amherst. Carbide's duty under those circumstances was to warn Amherst and its employees of any hidden danger or latent defect. There was no hidden dan- [fol. 613] ger or latent defect in the barge. It was the duty of Amherst to supply its employees with a reasonably safe place in which to work. It knew and controlled the conditions of the work and the equipment which would be used.

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[3] See discussion in *Alaska S.S. Co.* v. *Petterson*, 205 F.2d 478, at 479.

It was Amherst's responsibility to decide whether a temporary railing or stanchions should be erected, whether its men should be required to wear preservers, and whether and where life rings and other rescue equipment should be mounted. For negligence in any of these respects it would be liable to plaintiff herein for damages, were it not for the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 901-950.[1] But Carbide is not liable to plaintiff for negligence; it breached no duty it owed to Goett. *Lester* v. *United States; West* v. *United States; Raidy* v. *United States;* 38 Am. Jur., Negligence, sec. 97; Restatement, Torts, sec. 340, 343; Harper and James, *The Law of Torts*, vol. 2, sec. 21.1.

Judgment should have been entered in favor of defendant. This decision makes it unnecessary to pass on the other questions raised by the several parties.

Reversed.

[1] Under the terms of that Act Goett's wife and children are now entitled to receive, without proof of negligence on anyone's part, compensation which may exceed the maximum amount recoverable under the West Virginia Wrongful Death Act.

[fol. 614]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7588.

UNION CARBIDE CORPORATION, a corporation, Defendant and Third Party Plaintiff below, Appellant and Cross-Appellee,

vs.

ELLEN GOETT, as Administratrix of the Estate of Marvin Paul Goett, deceased, Plaintiff below, Appellee and Cross-Appellant,

and

AMHERST BARGE COMPANY, a corporation, Third Party Defendant below, Appellee.

Cross-Appeals From the United States District Court for the Southern District of West Virginia.

This Cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

JUDGMENT—Filed and entered May 27, 1958

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of West Virginia, at Charleston, with direction to enter judgment in favor of defendant (appellant and cross-appellee here) in accordance with the opinion of the Court filed herein; and that the costs on appeal be paid by the appellee and cross-

[fol. 615] appellant.

Simon E. Sobeloff, Chief Judge, Fourth Circuit.
Morris A. Soper, United States Circuit Judge.
Roszel C. Thomsen, United States District Judge.

[fol. 616] June 18, 1958, notice of motion for an order granting rehearing, etc., and affidavit in support of motion, submitted by the Clerk before Sobeloff, Chief Judge, and Soper and Haynsworth, Circuit Judges.

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7588.

[Title Omitted]

ORDER THAT QUESTIONS BE NOT CERTIFIED TO THE SUPREME COURT AND STAYING MANDATE—Filed and Entered June 18, 1958

On consideration of the Notice of Motion of the appellee and cross-appellant in the above entitled case for an order granting a rehearing, staying the mandate to the Court below, and for a hearing in order to bring to the Court's attention the question of whether certification of questions shall be submitted to the Supreme Court of the United States for determination, and for such further relief as to the Court seems just and proper, and the affidavit of [fol. 617] E. Franklin Pauley, Proctor for the appellee and cross-appellant:

It is ordered by this Court that the questions be not certified to the Supreme Court, and that the mandate of this Court, in this cause be, and the same is hereby, stayed pending application of the appellee and cross-appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for the writ of certiorari is filed in the Supreme Court within the time provided by law.

June 18, 1958.

Simon E. Sobeloff, Chief Judge, Fourth Circuit.
Morris A. Soper, United States Circuit Judge.
Clement F. Haynsworth, Jr., United States Circuit Judge.

[fol. 618] Clerk's Certificate foregoing transcript (omitted in printing).

[fol. 619]

SUPREME COURT OF THE UNITED STATES

No. 307, October Term, 1958

ELLEN GOETT, as Administratrix of the Estate of Marvin Paul Goett, Deceased, Petitioner,

vs.

UNION CARBIDE CORPORATION and AMHERST BARGE COMPANY.

ORDER ALLOWING CERTIORARI—March 2, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Office Supreme Court, U.S.
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AUG 25 1958
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1958

No. [redacted] 13

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased,

Petitioner,

against

UNION CARBIDE CORPORATION,

Respondent;

against

AMHERST BARGE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court of the United States

October Term, 1958

No.

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased,

Petitioner,

against

UNION CARBIDE CORPORATION,

Respondent,

against

AMHERST BARGE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above matter on May 27, 1958.

Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of West Virginia, Charleston Division (Honorable Ben Moore) in favor of petitioner is unreported and is set out in the appendix to this petition at pages 1a to 6a.

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported to date and is set out in the appendix to this petition at pages 7a to 17a.

Jurisdiction

This action, arising out of a maritime tort, was brought in the United States District Court for the Southern District of West Virginia, Charleston Division, as a civil action predicated upon diversity of citizenship and jurisdictional amount.

The action was later transferred to the admiralty division of said Court by motion.

The decree of the Trial Court in petitioner's favor was appealed by respondent, Union Carbide Corporation (hereinafter referred to as Carbide), and petitioner cross-appealed, *inter alia*, on the question of applicability of the West Virginia statutory monetary limitation of recovery in wrongful death actions.

The judgment of the United States Court of Appeals for the Fourth Circuit, reversing the Trial Court's determination, was entered on May 27, 1958.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Questions Presented

1. Whether an action for wrongful death and personal injuries arising out of a maritime tort and within the Admiralty and Maritime jurisdiction as conferred by the Constitution of the United States, the remedy afforded by a state Wrongful Death Statute, is limited by the common law concept of assumption of risk as a complete bar to recovery and is subject to the state statutory monetary limitation of recovery.

2. Whether a shipowner's duty to provide a safe place to work to a business invitee extends to obvious unsafe and negligent conditions aboard the vessel.

3. Whether state legislation may create a remedy to recover damages for the wrongful death of a maritime worker caused by breach of the warranty of seaworthiness, such doctrine existing as a concept of the general maritime law.

4. Whether the shipowner's warranty of seaworthiness continues with respect to maritime workers employed by a contractor during a periodic "minor repair" operation.

5. Whether the appellate Court may reverse the Trial Court's findings of lack of assumption of risk of a negligent condition by a further unsupported ruling that it was obvious and outside the owner's duty to correct; and of the vessel's unseaworthiness after delivery to a contractor, where the higher Court confirmed the existence of the condition at the time of delivery of the vessel to the contractor.

6. Whether the general maritime law permits a cause of action for wrongful death.

Statutes Involved

The petitioner as administratrix sued to recover money damages for wrongful death and personal injuries sustained within the Admiralty and Maritime jurisdiction, as supplemented by the Wrongful Death Statute of West Virginia, § 5474(5), the relevant section which reads as follows:

> "§ 5474. (5) Action for Wrongful Death.—Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the

death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. * * * "

The respondent, Carbide, asserted the applicability of § 5475(6), of the West Virginia Statutes, which reads thusly:

"§ 5475. (6) Party Plaintiff in Such Action; Damages; Distribution; Limitation:— * * * In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars; Provided, however, if the plaintiff in such action shall prove by a preponderance of the evidence financial or pecuniary loss sustained by a distributee or distributees of such deceased person in an amount exceeding the sum of ten thousand dollars the jury may give such damages as shall equal such financial or pecuniary loss, not exceeding twenty thousand dollars as the total of all damages recoverable in such action, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. * * * "

Statement of Facts

The facts are set out in the opinion of the United States Court of Appeals with the additional bracketed matter inserted by the writer.

Marvin Paul Goett, an employee of Amherst Barge Company, while sandblasting a tank barge owned by Union Carbide & Carbon Corporation, fell into the Kanawha River and was drowned. The barge had been turned over to Amherst for repairs and improvements and was under its sole control. Since the barge was an unmanned barge [when in transit], it had no life rings or other rescue equipment.

Carbide was the owner of the CC-204, an unmanned steel tank barge, with a flat deck. Except for pipe lines it had no superstructure of any kind, but there were kevels along the outer edges of the deck to assist in mooring.

It had no railings around its deck and was not equipped with any life rings or similar rescue equipment. Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys [when in transit], and it is not customary for such barges to be so equipped [for actual navigation]. The barge and its equipment had been inspected, certified and approved by the Coast Guard; the certificate of inspection issued on April 1, 1955, granted permission for navigation as an unmanned tank barge on rivers and inland waters tributary to the Gulf of Mexico, approved for use without equipment other than fire extinguishers. [The Trial Court found, as a finding of fact, that the barge was not an unmanned barge at the time of Goett's death.]

Amherst owns and operates a repair dock, with marine ways on the Kanawha River at Reed, West Virgina. In October, 1955, Carbide contracted with Amherst for a biennial drydocking, certain welding, repairs and improvements to the barge, including installation of twenty-four Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides, with preparation for the painting by means of sandblasting. [The purchase order contract called for painting and minor repairs at the total price of $4,712.60 (R. 559-560). Carbide conceded that they were indeed minor in its answer to plaintiff's interrogatories, #24.] The work was to be done in accordance with Carbide's written specifications. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications.

In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 2. Carbide's supervisor of barge maintenance went on board the barge on the following day with

Amherst's maintenance superintendent, to point out and discuss the work that was to be done. [The vessel was then afloat].

No officer, crewman, watchman or other person employed by Carbide was left on or with the barge after it was delivered to Amherst; it was in the exclusive care, custody and control of Amherst on October 5, when Goett was drowned. The barge was then afloat on the Kanawha River, lying along shore, near Amherst's marine ways; it was moored to and against the head of a digger boat, which lay downstream from the barge. The digger boat was attached to the shore by a semi-permanent ramp, which was the means of access to the barge from the shore. A ring-type life buoy with a line attached was mounted on the digger boat.

Goett, an employee of Amherst, while sandblasting the deck surface of the barge, fell into the Kanawha River and was drowned. He had been on the barge on October 4 to move the sandblasting equipment aboard, and began work in the morning of October 5. The sandblasting equipment consisted of a heavy machine sitting on the deck of the barge, but movable from place to place, with two hoses leading from the machine. Goett was holding the nozzle of one of the hoses in his hands, and was directing the sandblast against the surface of the deck while he walked slowly across it. He was wearing a canvas hood over his head and shoulders to protect him against flying sand from the sandblaster and was also wearing a respirator. He was not wearing a life jacket [concededly hazardous to the wearer (p. 197, Vol. II of trial minutes)], although life jackets were available in Amherst's supply house to any employee who desired to wear one while at work. [There was no evidence that Goett knew of their existence. Other employees aboard the barge had no knowledge of their existence or availability (pp. 128, 132, 140, 141, 146, Vol. I of trial minutes)]. The great majority

of Amherst's employees preferred not to wear life jackets, and they were not required to do so [because of the danger involved]. When last seen on the barge, Goett was walking slowly backward towards a kevel at the outboard edge of the barge. A minute later Goett's fellow workmen on the barge heard the noise of the nozzle thrashing against the side, ran to the edge of the barge and looked over. Goett was in the river, just outboard of the position in which he was last seen on the barge. Three men immediately went into the river to save him, but Goett fought them off [due to panic] and prevented them from keeping a grip on him. After several minutes he slipped beneath the surface and was drowned. About that time, Amherst's maintenance superintendent arrived on the scene and threw a life buoy off the digger boat into the water, but it was too late.

[The manner of obtaining the life buoy on the digger boat, which was not thought of by the various workers in the excitement of the moment (p. 97, Vol. I of the trial minutes), was explained by Martin, Amherst's superintendent—to run 160 feet from where Goett fell to the edge of the barge, step from the barge to a ramp 12 feet wide, step over a guard rail to a stairway of 11 steps and then go 15 feet to the preserver and finally retrace the entire route holding the preserver (pp. 57-60, Vol. II of the trial minutes)].

Goett's administratrix filed a civil action against Carbide in the Southern District of West Virginia based upon the West Virginia Wrongful Death Statute. [The action was predicated upon the general maritime law as supplemented by the remedy afforded by the state Wrongful Death Statute] alleging that Goett's death was due to the failure of Carbide to have rescue equipment aboard the barge. Carbide brought in Amherst as a third party defendant, alleging that by express and implied contract it was entitled to indemnity. Answers were filed by Carbide and by Amherst, denying liability and raising the

defenses of contributory negligence and assumption of risk. On plaintiff's motion, over the objection of Carbide and Amherst, the case was transferred to the Admiralty side of the court.

The district judge found as facts: that Carbide should have foreseen that many of Amherst's employees would work on the barge; that under these circumstances it was negligence for Carbide not to equip the barge with safety and rescue equipment; that the barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used; that failure to provide rescue equipment was the proximate cause of Goett's death; and that Amherst had exclusive custody, care and control of the barge at the time Goett fell therefrom.

That Goett was not guilty of any negligence contributing to his death; that Goett did not assume the risk of the failure of Carbide to have rescue equipment available; that plaintiff is entitled to recover $20,000 against Carbide, but that if the limitation in the West Virginia Wrongful Death Act did not apply, plaintiff would have been entitled to recover $50,000; and that Carbide is not entitled to indemnity from Amherst,[1]

The opinion of the Trial Court was handed down at the close of the trial on May 13, 1957. On June 24, 1957, further findings and conclusions were incorporated in a letter by the Trial Judge to counsel for all parties.

On August 24, 1957, a decree was entered awarding the petitioner the sum set forth above.

On September 23, 1957, Carbide appealed from the decree and on October 1, 1957; petitioner cross-appealed.

Petitioner's motion for certification of the questions involved in the cross-appeal was denied on March 3, 1958.

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[1] Close of facts set forth in the Court of Appeals' opinion.

Argument of the appeal and cross-appeal was heard on April 9, 1958, in the United States Court of Appeals for the Fourth Circuit before Chief Judge Sobeloff, Circuit Judge Soper and District Judge Thomsen.

The opinion of the Court, by District Judge Thomsen, was filed on May 27, 1958.

On a second motion for certification of the questions, denied on June 18, 1958, the mandate to the District Court was stayed pending the timely filing of this petition for writ of certiorari.

Reasons for Granting the Writ

1. The United States Court of Appeals for the Fourth Circuit, in applying the harsh common law concept of assumption of risk under the law of West Virginia, acted in conflict with decisions of the Courts of Appeals for the Second Circuit (*Halecki* v. *United*, 251 F. 2d 708, wherein Honorable Learned Hand, long acknowledged as among the most brilliant of jurists, stated that such application would be "to the last degree capricious and irrational") and for the First Circuit (*O'Leary* v. *United States*, 215 F. 2d 708, wherein the Court held that the distinction between personal injury and wrongful death actions was incongruous, that it would "create divergence in a field where uniformity has long been considered important"). The Court's decision advanced the very capricious and irrational distinctions between actions for personal injuries and wrongful death that this Honorable Court and others throughout the nation, as well as legislatures of every state, have uniformly sought to negate.

This Court has now granted petitions for writ of certiorari to the United States Court of Appeals for the Second Circuit in *Halecki* v. *United, supra* and to the United States Court of Appeals for the Third Circuit in *Skovgaard* v. *M/V Tungus*, 252 F. 2d 14.[2]

[2] Argument of both cases scheduled for a date during the fall months of this year.

Both matters for wrongful death arising out of a maritime tort, the remedy grounded upon a state Wrongful Death Statute, were factually similar to the instant matter giving rise to the same or similar issues presented herein, and involved the question of extent of a shipowner's obligations under negligence and seaworthiness concepts to employees of an independent contractor, the applicability of general maritime law or common law principles with respect to defenses of assumption of risk and contributory negligence, the availability of the state Wrongful Death Statute as a remedy in an action predicated, *inter alia*, upon the breach of the warranty of seaworthiness and the existence and availability of said warranty to the employees of the contractor during a ship's business operation other than loading or unloading the vessel.

The Court below, in the case at bar, diametrically opposed the position taken by Honorable Learned Hand for the majority bench in the *Halecki* case, *supra*, and that taken by the majority of the Court in the *Skovgaard* matter.[3]

The concept of assumption of risk as a complete bar, peculiar only to common law jurisdictions, has been uniformly rejected by Admiralty Courts. *Panama* v. *Johnson*, 289 F. 964, aff'd 264 U. S. 375; *Sanford* v. *Caswell*, 200 F. 2d 830; *Becker* v. *Waterman*, 179 F. 2d 713; *Armit* v. *Loveland*, 115 F. 2d 308; *The Secandbee*, 102 F. 2d 577; *Pittsburgh* v. *Palo*, 64 F. 2d 198; *The Calvert*, 51 F. 2d 494; *New Berne*, 80 F. 2d 244, extended to maritime workers, *Imperial* v. *Drlik*, 234 F. 2d 4.[4]

Stressing the incongruity which would result from an application of common law principles in an action within the

[3] To be discussed in subsequent points herein.

[4] Under the Jones Act, 46 U. S. C. § 688, the doctrine has been completely destroyed, the sole test being that of comparative negligence in cases where the seamen have a free choice of safe or unsafe gear and voluntarily choose the dangerous appliance. *Socony* v. *Smith*, 305 U. S. 424.

Admiralty and Maritime jurisdiction, the state Wrongful Death Act does not set forth the principles to be employed in land death actions regarding the defense of assumption of risk, but applies the common law solely because the state is governed by common law concepts, the defense of assumption of risk acting as a complete bar to recovery in wholly non-maritime matters following naturally in death actions as it would in those for personal injuries. The decision by the Court of Appeals in the case at bar would enforce a defense alien to and tending to stifle the liberal concept of comparative negligence, established as the prevailing law in the Admiralty jurisdiction, thus effectively destroying the very uniformity between personal injury and death actions that the state legislature strove for by its passage of the Act.

This Court has repeatedly declared that the locale of the accident (the high seas or navigable waters), establishes the Admiralty and Maritime jurisdiction. In *Atlantic* v. *Imbrovek*, 234 U. S. 52 and *Atlantic* v. *Szczesek*, 234 U. S. 63, companion cases arising out of the same maritime tort, one for personal injuries, the other for wrongful death pursuant to the state statutory remedy, the identic character of both actions was affirmed.

City of Norwalk, 55 F. 98 (discussed with approval by this Court in *Just* v. *Chambers*, 312 U. S. 383), discussed the Wrongful Death Statute of New York and stated that the cause of action was still the creation of the maritime law, that the state statute gave rise only to a right of action, but that the case was no less maritime in its essential.

> "The state statute does not create the *cause* of action. It does, indeed, create a new *right*, and liability; but it does not create a single one of the elements that make up the fundamental cause of action, that is, the essential grounds of the demand. All these elements exist independently of the statute, and are not in the least affected by it. It no more creates the wrong, or the damage, than it creates

> the negligence or the death; nor does it, as in the pilotage and double wharfage cases, add anything to the damages sustained. It authorizes no recovery except for 'the pecuniary damages' already existing. It is apparent, therefore, that, as suggested by Mr. Justice Clifford in Steamboat Co. v. Chase, 16 Wall. 532, the statute does no more than 'take the case out of the operation of the common-law maxim that an action for death dies with the person.'
>
> The effect of the statute is to attach a new legal right and responsibility to a purely maritime transaction. But that does not make the case in its essential nature any the less a *maritime* case. Nor does the enforcement of the statute extend the jurisdiction of the court, any more than the giving of damages for the first time for injuries to a cargo of dynamite or petroleum would be an extension of jurisdiction because those articles were new to commerce" (p. 109).

To the same effect is *Chelentis* v. *Luckenbach*, 247 U. S. 372, wherein this Court stated:

> "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury" (p. 384).

Great Lakes v. *Kierejewski*, 261 U. S. 479, affirmed the existence and superiority of the Admiralty jurisdiction in death actions due to a tortious act in a maritime locale. See also: *Robins* v. *Dahl*, 266 U. S. 449; *Gonsalves* v. *Morse*, 266 U. S. 171; *Baizley* v. *Span*, 281 U. S. 222; *The Jefferson*, 215 U. S. 130.

The Admiralty and Maritime jurisdiction is conferred upon the federal power by the Constitution and is superior to the law of the several states, taking from the lesser politic body "all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations." *Knickerbocker*

v. *Stewart*, 253 U. S. 149; *Lottawanna*, 88 U. S. 558; *Workman* v. *New York*, 179 U. S. 552; *Benedict on Admiralty*, Vol. I, §§ 1, 10.

The Admiralty jurisdiction being superior as one of a special class of powers conferred by the Constitution, this Court has repeatedly declared its paramount status, further holding that while state law may at times supplement or modify the general maritime law, it cannot contravene the essential purpose of, work material prejudice to, or interfere with its characteristics or the harmony and uniformity of said law in its international and interstate relationships. *Just* v. *Chambers*, 312 U. S. 383; *The Roanoke*, 189 U. S. 185; *Washington* v. *Dawson*, 264 U. S. 219; *Spencer* v. *Hicks*, 285 U. S. 502; *Union* v. *Erickson*, 248 U. S. 308; *DiSanto* v. *Pennsylvania*, 273 U. S. 34. See also: *Jansson* v. *Swedish*, 185 F. 2d 212; *Rogers* v. *City*, 285 F. 362; *Kuhn* v. *City*, 274 N. Y. 118; *Riley* v. *Agwilines*, 296 N. Y. 402; *McFall* v. *Belge*, 304 N. Y. 314.

This Court, in *Robins* v. *Dahl*, *supra*, asserted that claims affecting maritime workers and the scope of their rights and liabilities were within the Maritime jurisdiction and were not of local concern. See also: *Gonsalves* v. *Morse*, *supra*; *Baizley* v. *Span*, *supra*; *Jefferson*, *supra*.

Pope & Talbot v. *Hawn*, 346 U. S. 406, discussing the defense of contributory negligence as a complete bar or in mitigation of damages, averred that even a state created remedy would be controlled by the substantive general maritime law.

> "(a) The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires. Petitioner presents no persuasive arguments that admiralty should now adopt a dis-

credited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight.

(b) Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, 'a type of action which the Constitution has placed under national power to control in "its substantive as well as its procedural features. * * * "' *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 386. And Hawn's complaint asserted no claim created by or arising out of Pennsylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to *enforce a state created remedy for this right, federal maritime law would be controlling. While states may some time supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court.* These principles have been frequently declared and we adhere to them. See e.g., *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243-246, and cases there cited." (pp. 408-410) (italics ours).

O'Leary v. *United States*, 215 F. 2d 708, following the principles laid down in the *Hawn* case, declared the supremacy of the maritime law over state common law doctrines even as to wrongful death actions arising out of maritime torts which occurred on navigable waters within territorial waters of a state.

The United States Court of Appeals for the Second Circuit, in *Halecki* v. *United, supra,* followed the interpretation of the *Hawn* decision as stated in *O'Leary* v. *United States, supra.*

The District Court in the case at bar found, as a finding of fact, that Carbide was negligent in failing to provide reasonable safety equipment in order to furnish workmen with a safe place to perform their duties, having knowledge of the conditions that would prevail during the painting and repair operation.

The Court of Appeals agreed that Goett was entitled to a safe place to work, that the failure to provide him with safety and rescue equipment constituted negligence, *Sadler* v. *Pennsylvania*, 159 F. 2d 784. The reversal of liability was predicated solely upon the supposed lack of Carbide's duty to inform Goett of the obvious, negligent condition on the misconceived theory that it was a risk that Goett assumed as a complete bar to recovery under common law principles of law.[5] Thus—the Court of Appeals destroyed this maritime cause of action by erroneously following common law principles in derogation of the paramount concepts of the general maritime law as aforesaid.

The Court of Appeals, in ruling that the state monetary limitation was binding upon the Admiralty jurisdiction, was in conflict with the decision of this Court in *Workman* v. *New York*, 179 U. S. 552, a libel by the shipowner resulting from a collision between his vessel, moored at a City dock, and a City owned fireboat. The municipal law limited liability against the City. This Court upheld the doctrine that the general maritime law as a Constitutional grant of power controlled the issue of monetary limitation, that to permit local law to limit recovery would be destructive of the essential characteristics and uniformity and harmony

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[5] The Court's ruling that Carbide had no duty except to warn of latent defects was nothing more than the reverse of the archaic and discarded common law doctrine that there was no duty to warn of the obvious, that the victim assumed the risk of an openly defective condition.

The District Court found that Goett did not assume the risk of lack of rescue equipment.

of the Admiralty jurisdiction, which would result in the "practical destruction of a uniform maritime law."

> "The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the Federal Government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright and commerce clauses of the Constitution. It would result that a municipal corporation, in the exercise of administrative powers which the state law determines to be governmental, could with impunity violate the patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels." (p. 558)

* * *

> "* * * In doing so, it becomes manifest that the decisions of this court overthrow the assumption that the local law or decisions of a State can deprive of all rights to relief, in a case where redress is afforded by the maritime law and is sought to be availed of

in a cause of action maritime in its nature and depending in a court of admiralty of the United States." (p. 560)

The Thielbek, 241 F. 209, was an appeal in an admiralty suit by shipowners against each other and against the City of Portland, which arose out of a collision. The decree was in favor of one shipowner against the other and the City.

The City was engaged in pilotage and towage service under legislative enactment which had in its charter a limitation of liability of $10,000.

The decree was for a sum greater than the limitation.

The Court, in affirming, held that local law or statutes could not abrogate or limit the amount of damages recoverable under the maritime law in a suit properly before an Admiralty Court.

See also: *Southern* v. *Jensen*, 244 U. S. 205 and *Knickerbocker* v. *Stewart*, *supra*, in which this Court affirmed the view that the state could not, by legislation, grant a compensation remedy to maritime workers in derogation of their maritime rights; and *Moore-McCormack* v. *Amirault*, 202 F. 893; *Newburgh* v. *Texas*, 227 F. 2d 732 and *New Zealand* v. *Earnmoor*, 79 F. 368, in which the question of interest as a part of recovery of damages was held to be controlled by maritime principles rather than by state legislation.

The petitioner prays that this Honorable Court will take for its consideration the issues presented in this matter, that this cause will be joined in argument with the *Halecki* and *Skovgaard* cases.

2. The ruling of the Court of Appeals is in conflict with the decision in *Halecki* v. *United*, *supra*, in which Honorable Learned Hand, discussed the reponsibility of a shipowner to the employee of the independent contractor after delivery of the vessel and during the repair period. Judge

Hand, in declaring the shipowner responsible for lack of reasonable care in ascertaining the methods and manner of the contractor's activities, held:

> "The deceased was certainly an 'invited person,' or 'business guest,' and the shipowner was liable, not only for the negligence of the master, but, although the work was let out to a subcontractor, also for any lack of 'reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities.' Being charged with knowledge that so dangerous a substance as tetrachloride might be used, it was proper to leave to the jury whether the 'methods and manner' of its use were proper. So much for the negligence count."

The Court of Appeals herein destroyed the findings of fact of Carbide's negligence solely on the incorrect belief that its duty to Goett was terminated by the simple expedient of delivering a vessel, which it knew would be negligently and defectively equipped for the repair work, to the contractor.

The Court conceded the duty of a shipowner to provide safety and rescue equipment for business visitors during transit, admitted Carbide's knowledge of the lack of such equipment aboard the vessel having notice of the fact that Goett and other employees would be on the vessel in furtherance of its business, pointed out that Carbide's supervisor of barge maintenance went aboard the vessel after delivery and before Goett's death to inspect the ship, which was afloat at the time. The Trial Court had ruled, as a finding of fact, that Carbide did have knowledge that men of Goett's class would be on the vessel for the sandblasting, painting and minor repair operation, and had predicated Carbide's liability upon said knowledge and its obvious indifference to the unsafe condition of the vessel.

Judge Hand rejected the archaic principle of law adhered to by the Court below in the case at bar.

Petitioner respectfully prays that the conflict between the Courts of Appeals for the Second and Fourth Circuits be considered by this Honorable Court in order to fully establish, with finality, the extent of the shipowner's duty to those maritime workers who board its vessels for its benefit and to aid its shipping business.

3. The Court below, because of the nature of its ruling, did not determine whether the state Wrongful Death Statute created a remedy grounded upon the breach of the warranty of seaworthiness, though admitting that there was a division of opinion among the several circuits, citing *Lee* v. *Pure*, Sixth Circuit, 218 F. 2d 711; *Graham* v. *A. Lusi, Fifth Circuit*, 206 F. 2d 223; *Halecki* v. *United*, Second Circuit, 251 F. 2d 708; *Skovgaard* v. *M/V Tungus*, Third Circuit, 252 F. 2d 14.

The question is involved herein if this Court determines that the deceased was within that class of workers to whom the doctrine of seaworthiness was applicable.[6]

The latter two cases now pending argument before this Court and the conflict among the circuits being apparent, petitioner respectfully prays that this Court grant this petition in order to fully determine the issue.

4. The Court of Appeals declared that the warranty of seaworthiness did not extend to the deceased. By its ruling the Court destroyed the effect of this Court's decision in *Pope & Talbot* v. *Hawn, supra*, wherein the doctrine of seaworthiness was extended to a carpenter brought aboard a vessel to repair a defect. The doctrine was thus extended to all classes of workers who were subject to the same

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[6] Discussed in Point 4, *post*.

dangers as those who sailed the ships and were entitled to like treatment.

Coupled with the *Hawn* case, *Alaska* v. *Petterson*, 205 F. 2d 478 aff'd 347 U. S. 396, affirmed that the doctrine was a non-delegable duty and species of strict liability irrespective of fault in holding that surrender of control of the vessel for a shipping operation in furtherance of the shipowner's business did not terminate the owner's duty to provide the same protection to those performing maritime functions, regardless of their employment status. See also: *Rogers* v. *United*, 205 F. 2d 57, rev'd 347 U. S. 984.

The *Hawn* and *Petterson* decisions have been consistently followed. The sole limitation of the extension of the warranty to maritime repair workers concerned major repair jobs (structural conversions) which were not traditionally ship's business. *Berryhill* v. *Pacific*, 238 F. 2d 385; *Berge* v. *National*, 251 F. 2d 717.

In *Halecki* v. *United*, *supra*, the Court of Appeals for the Second Circuit affirmed the doctrine's extension to workers of Goett's class, unequivocally distinguishing its decision in the *Berge* case, when the work to be performed was not major in nature and was of the type traditionally performed by seamen.

A like result was arrived at in *Torres* v. *The Kastor*, 227 F. 2d 664, which involved a worker cleaning the hold from the effect of a previous cargo to make the vessel ready for a new voyage; as it was to a night watchman in *Ross* v. *S.S. Zeeland*, 240 F. 2d 820; and to a worker stripping lumber from a hold in converting the vessel from a merchant to a troop carrying ship in *Read* v. *United States*, 201 F. 2d 758; and to men cleaning the deep tanks of a vessel, *Crawford* v. *Pope & Talbot*, 206 F. 2d 784; and a dock crewman freeing the railroad ties which held the ship in drydock in *Imperial* v. *Drlik*, *supra*; and an electrician who fell off the deck while the ship was drydocked in *Lester* v. *United States*, 234 F.

2d 625; a workman cleaning the ship's generators during an annual overhaul and repair period in *Halecki* v. *United, supra;* and lastly to a maintenance foreman fixing a discharge pump in *Skovgaard* v. *M/V Tungus, supra.*

Thus—the decision in the case at bar is in conflict with determinations of this Court and various Courts of Appeals and in fact is in conflict with its own previous decisions.

The narrowing of the doctrine's applicability solely to periods of loading and unloading of vessels for all practical purposes destroys the remedy available to maritime workers performing ship's business and permits the shipowner to avoid its responsibility of assuring to those business invitees a seaworthy vessel while in the performance of repairs for the benefit of the shipowner.

The Court below conceded that the repairs herein were of a minor nature, lesser in extent than in the *Berryhill* or *Berge* cases or in *Raidy* v. *United States,* unreported as yet (involving structural changes while in drydock), yet negated the doctrine's applicability because the operation in progress at the time of Goett's death was that of sandblasting rather than loading or unloading of cargo from the vessel. The distinction, the petitioner submits, is invalid and the Court's ruling erroneous.

The same issues were presented in both the *Halecki* and *Skovgaard* cases. As such the petitioner again respectfully submits that this matter be joined therewith for argument in order to more fully determine the questions similarly involved in the three causes.

5. The Court below in arbitrarily reversing the findings of facts of the Trial Court acted in a manner contrary to the decision of this Court in *McAllister* v. *United States,* 348 U. S. 19, which declared that unless "clearly erroneous"

the findings of fact of the Trial Court should not be disturbed.

The Trial Court herein ruled that Carbide, having knowledge of the conditions that would prevail aboard the vessel failed to take reasonable care and measures to insure the safety of business invitees. The Court further ruled that the vessel was unseaworthy at the time of Goett's death.

The Court below found the unsafe condition to be present but ruled that Carbide's duty to equip the vessel with safety and rescue equipment terminated when it delivered the vessel to Amherst. Judge Learned Hand clearly and concisely disposed of the same question in refusing to permit a shipowner's duty to end without taking reasonable care to ascertain that the contractor's work would be carried out in a proper and prudent manner, *Halecki* v. *United*, *supra*, and concluded that the question of whether the shipowner showed reasonable care was one of fact, to be determined by the triers of the facts.

The Court below, conceding that the lack of equipment aboard the vessel at the time of Goett's death was due to negligence, petitioner submits that the factual issue was affirmed by the Court, but was erroneously qualified by an incorrect expression of Carbide's duty to Goett (and others of his class).

Further—the Trial Court found that the vessel was unseaworthy, that it was not unmanned at the time of Goett's death. As such, the Coast Guard requirements during transit were inapplicable (aside from the fact that the suit had not been brought on the ground of statutory violations).

The ruling of the Court below that the vessel was not unseaworthy was evidently based upon the erroneous assumption that a seaworthy vessel during transit cannot be-

come unseaworthy after delivery to a contractor for repair, citing *Lester* v. *United States, supra.*[7]

The reasoning of the Court below is in conflict with the decisions of this Court in *Alaska* v. *Petterson* and *Rogers* v. *United, supra,* in which the "relinquishment of control" doctrine was conclusively abolished. In ruling otherwise, the Court below herein once again demonstrated its failure to understand the basic concepts of the general maritime law, evolving from the duty to seamen to expand and incorporate its protective coverage to those workers who, because of modern industrial decentralization methods of performance of ship's business, face the same dangers as those who sail the ships.

Petitioner respectfully submits that the Appellate Court's decision is contrary to the settled weight of the prevailing law, that the finding of fact of the Trial Court of the vessel's unseaworthiness was correct, that it was abundantly proved by the conceded, total absence of rescue equipment aboard the vessel when Goett met his death.

6. In 1886 this Honorable Court in *The Harrisburg,* 119 U. S. 199, considered the question of whether a suit *in rem* would lie for the death of the first officer of a vessel off the coast of Massachusetts. The vessel was registered out of Philadelphia. Both Massachusetts and Pennsylvania had wrongful death statutes having a one year statute of limitations. The suit was brought by the widow five years after the death of her husband.

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[7] *Lester* v. *United States* involved nothing more than a factual ruling by the Court of Appeals that the Trial Court was incorrect in finding that a repair contract calling for replacement of a railing, *per se,* rendered the vessel unseaworthy if an accident occurred involving the absence of the railing. The appellate court expressly ruled that the doctrine of seaworthiness was applicable during the repair period. As such, the *Lester* case is diametrically opposite to the ruling of the Court of Appeals in the case at bar.

The Court stated the issues to be:

> (a) Whether a death action would lie in Admiralty in absence of a Federal or State statute;
>
> (b) If not, whether an action would lie when a right of action was given by a State statute, and
>
> (c) If so, whether the State statute of limitations would prevail?

The Court then fully discussed a number of decisions which had recently (at that time) determined the question. Those cases which had decided in favor of an abatement had done so on the basis of the death maxim under the common law; those which had ruled against the abatement had done so on the basis of inherent justice and equity principles of the maritime law.

Admitting that under Scottish or French law a recovery would be permitted (pp. 212-213), the Court ruled that there was no evidence presented of a different death maxim in Admiralty than on land in any country, that since the Court had the right only to declare what the law was and not what it should be, there could be no recovery.

As such, the basis of the Court's decision was that maritime law was the same as the common law,[8] and that, although there were numerous cases to the contrary, based upon justice and the equity of the situation, the Court did not have the power to determine the law upon social policy.

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[8] Of note was the statement that Lord Campbell's Act of England did not (at that time) permit a suit in Admiralty, citing *Vera Cruz*, 10 App. Cas. 59, which Act has since been revised to permit such cause of action.

Whether the Court's decision would have been the same had the English Lord Campbell's Act permitted a suit in Admiralty at that time, as it now does, is indeed questionable.

The Court did not appear to take into consideration the fact that some of the states did not follow the common law.

The Harrisburg is the leading case and is, in fact, the basis for the doctrine, as we know it today, of abatement of the cause of action at death under the general maritime law. Cases since *The Harrisburg*, almost without exception when upholding this harsh principle, cite it as controlling of the question.

Petitioner respectfully submits that this Honorable Court should now reconsider this entire question to determine whether the force and effect of this 72 year old decision should now be negated in light of the vast changes of moral and legal thought which have permeated every phase of the general maritime law since that time. The modern Admiralty suit was first perfected by the Roman law and is similar to the civil law as it is still practiced by countries subject thereto.

When the *Harrisburg* decision is read in light of the historical background of the law, it would appear that the Court was not duly apprised of the many other sources of law from which the maritime jurisdiction of the different nations and American colonies had developed. The Court looked only to the common law in determining the scope of the general maritime law, the *one* legal system which violently opposed the general maritime law. It cannot be contradicted that the maritime law was taken by the English from the Codes of nations which had perfected legal theory centuries before English civilization progressed from the age of savagery.

The principle of abatement of a cause of action by death was but a corollary principle arising out of the tort theorems of feudal England that "trespass" was of intentional character and was to be repaid by the "an eye for an eye" doctrine of revenge.[9] As such, "death was the great composer of strife."

The Court in its *Harrisburg* decision readily admitted that the doctrine was harsh and unyielding in a system of

[9] A trespass on the case, which eventually evolved into the unintentional tort, was not developed as a legal theorem until a later date.

law grounded upon equity and justice. It freely conceded that a number of cases had determined that a cause of action for wrongful death would lie, based solely upon tenets of righteousness and compassion for the family of the deceased seaman, but felt bound to pursue the policy of the common law in the absence of any evidence that the law of the sea was different than the law of the land. The Court did not attempt to take into consideration those other systems of law, from which the general maritime law, as we know it, most assuredly developed and which, in fact, permitted a cause of action to continue unhampered by the death of the wronged party. The Court further pointedly implied that if it felt free to determine the matter on grounds of justice and equity, an opposite conclusion might well have been reached.

The last 50 years have been extensive legislation concerning the health and safety of workers in the maritime and railroad industries.

The Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, in 1908 granted the right of claim by a railroad worker against his employer for the negligence of said employer. The Merchant Marine Act of 1920 (the Jones Act), 46 U. S. C. § 688, extended the rights granted to the railway employees by the Federal Employers' Liability Act to a seaman against his employer. Neither enactment set forth specific survivor benefits, *The Miramar*, 31 F. 2d 767, aff'd 36 F. 2d 1021.

Congress then effected a cause of action for wrongful death of any person on the high seas, Death on the High Seas Act, 46 U. S. C. § 761, *et seq.*

Passage of the Jones Act in 1920 gave to crew members, to longshoremen and harbor workers, the right of a cause of action against their employer. Thus—from that time and until the enactment of the Longshoremen's and Harbor Workers' Compensation Act in 1927, 33 U. S. C. § 901, *et seq.*, a worker such as the deceased herein, had a cause

of action for wrongful death arising out of the negligence of his employer. The coverage for a cause of action for wrongful death of all maritime workers was thus complete whether the accident occurred at sea or on the territorial waters of a state.

It was only upon the passage of the Compensation Act, *supra*, that the newly legislated right under the Jones Act was limited to crew members, as the exception to the coverage of the created Federal Compensation System.

Just v. *Chambers*, 312 U. S. 383, was an action for wrongful death by drowning, arising out of employment on a yacht in the territorial waters of Florida. The Supreme Court discussed whether the Wrongful Death Statute of Florida would be recognized and enforced for the Admiralty Courts and stated, concerning the exercise of the judiciary power in establishing maritime law, that:

> "The rule of the non-survival of a cause of action against a deceased tortfeasor has but a slender basis in admiralty cases in this court. See Crapo v. Allen, 6 Fed. Cas. (No. 3360) 763; Cutting v. Seabury, 1 Sprague 522, 525; In re Statler, 31 F. 2d 767, 36 F. 2d 1021; Cortes v. Baltimore Insular Lines, 287 U. S. 367, 371" (footnote 4, p. 387).

The Court stated that leading continental states, whose law had developed from the civil law, permitted a cause of action arising out of wrongful death. Hughes on Admiralty, Chapter X, Sections 108-110, pages 224-226.

Cox v. *Roth*, 348 U. S. 207, indicated that this Court might reconsider the "slender basis" of the Admiralty rule against survivorship of death action if the issue was properly posed, noting that:

> "Nevertheless, in considering the harshness of the rule sought to be imposed under the Jones Act, we do note that advancing civilization and social progress have brought 43 of our States to include in their general law the principle of the survival of causes

of action against deceased tortfeasors, and that such recovery, rather than being exceptional, has now become the rule in almost every common-law jurisdiction. See the discussion by Roscoe Pound on Death Statutes as Part of the General Law, 13 NACCA L. J. 188-189 (May 1954)" (p. 210).

The Court itself has thus implied that it would consider whether such abatement has retained its vitality in view of the fact that the "slender basis" for the rule of non-survival in Admiralty has been whittled away by legal and social progress to a point where it should no longer form a proper support for an archaic rule in disrepute for many years.

In the recent case of *Kernan* v. *American*, 355 U. S. 426, the Court again appeared to react unfavorably to the effects of *The Harrisburgh* decision, evidenced by a footnote in the decision couched in terms of what seems to be dissatisfaction at the obviously unsatisfactory result of the abatement doctrine.

Admiralty is not a derivation of the common-law but takes its principles from the many legal systems of the maritime world as adopted and accepted by present day legal thought in the United States.

Benedict on Admiralty, Vol. 1, § 8, pages 9-11 stated:

"§ 8. Origin of Admiralty and Maritime Jurisdiction.

Unlike the common law, the American admiralty is not a derivation of English jurisprudence but of the general maritime law adapted to our circumstances and molded by our practice. The admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England—or by the local traditions of that land—but is to be interpreted by an original view of its essential nature and objects and with reference to analogous jurisdictions in other countries constituting the maritime commercial world as well as the jurisdiction in England. Those who framed the Constitution and the lawyers in America in that day were familiar with a jurisdic-

tion different and more extensive in most of the original States when they were colonies than was allowed in England. The general system of maritime law, which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' Admiralty cases are as old as navigation itself and, as they arise, the law, admiralty and maritime, as it has existed for ages, is applied by our courts. The general maritime law, however, is only so far operative as law in any country as it is adopted by the laws and usages of that country. There is no 'mystic overlaw.' It is the maritime law as accepted and received in the United States that governs and, though the general maritime law is the ground work of our own maritime system, it is only by voluntary adoption and with such qualifications as our jurisprudence and statutes have made in it that it becomes our law. It is in this sense—a sense that contemplates both judicial adaptation and legislative modification—that it may be said that the Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law. The precise scope of admiralty jurisdiction is 'not a matter of obvious principle or of very accurate history' but the jurisdiction is of broad scope in this country and the progress of our jurisprudence in freeing the jurisdiction from pre-revolutionary English restrictions and in giving a distinctive character to our maritime law has been marked by the overruling of earlier decisions and the qualification or rejection of earlier expressions of judicial thought" (pp. 9-11).

The recent case of *Bisso* v. *Inland*, 349 U. S. 85, was noted for its affirmation of this Court's scope of power to determine legal issues on the basis of public policy as well as judicial rule, a right it evidently felt it did not have in 1886.

Burnet v. *Coronado*, 285 U. S. 393, discussed the strength of *stare decisis* (dissent opinion of Mr. Justice

Brandeis, since he called for an overruling of a prior decision by the Court). With utmost candidness Justice Brandeis laid down the rule that *stare decisis* should be followed only when results would adequately protect the public.

> "*Stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command. 'The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.' Hertz v. Woodman, 218 U. S. 205, 212. *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. Compare National Bank v. Whitney, 103 U. S. 99, 102. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function. Compare Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 681. Recently, it overruled several leading cases, when it concluded that the States should not have been permitted to exercise powers of taxation which it had theretofore repeatedly sanctioned. In cases involving the Federal Constitution the position of this Court is unlike that of the highest court of England, where the policy of stare decisis was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked.
>
> *The reasons why this Court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution.*" (pp. 405-410) (Italics ours)

It would appear that the Federal Courts which have found themselves bound by the common law rule of abatement, have only reluctantly come to that conclusion. The hope of future remedy by judicial decision or legislation of a doctrine that has no meaning in the law as we know it today has often been expressed. It seems apparent that this rigid medieval doctrine based upon the "vendetta" should have no place in the modern conception of justice and equity which has, from time immemorial been the guiding force in maritime matters. By its destruction of claims by means of construction of a fictional difference between a cause of action for a personal injury and one for wrongful death, the death maxim has succeeded in the erection of an artificial barrier to just, equitable and meritorious determinations of death claims.

Surely, Justice Brandeis' decision in the *Burnet* case, *supra*, gives meaning to the law as the shaping force of our nation, alive to the changes and modifications of legal thought and governed only by what has been accepted as the wise rule of action in the light of experience and the force of better reasoning.[10]

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[10] While all states have either wrongful death or survival statutes, or both, the following may have importance in explaining the destruction of the uniformity of the maritime law as a result of variation in the state legislation.

There are 13 states with limitation of maximum benefits and one state with a limitation only as to suits against railroad carriers and municipal departments. Massachusetts, having a limitation, has a penal statute only.

In each state the limitation depends upon the dependency elements and the relationship of said dependency. Some permit recovery for hospital expenses, some for pain and suffering, some for mental anguish of the dependents.

It would seem that the dependency of the general maritime law upon the various state statutes, while on the surface appearing to alleviate the harshness of the common law rule of abatement, basically fails in the purpose in so far as it concerns suits arising out of a maritime tort, since it strikes at the very core of the purpose of the maritime law, uniformity and harmony in its essential characteristic features of international and interstate relations.

Acting upon what petitioner considers to be a directive from this Court, this issue as to whether there shall, in the future, be an abatement of a cause of action arising out of a maritime tort upon the death of the wronged party is herewith most respectfully presented for consideration.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: August 22, 1958.

Respectfully submitted,

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HARVEY GOLDSTEIN,
on the Brief.

APPENDIX

Findings of Facts and Conclusions of Law of the District Court (Honorable Ben Moore).

The Court: I am going to make a finding of fact and conclusions of law, and in doing so I do not expect to discuss the facts or the law any further than is enough to show an appellate court, if the case should be appealed, the basis on which I rest the findings both of fact and of law.

The findings of fact, then, are these:

First: There was no safety or rescue equipment on the barge from which the plaintiff fell to his death.

Two: It was foreseeable to defendant Union Carbide and Carbon Corporation, as its name was then—is that its name then or now?

Mr. Love: Then. That's the name in the case.

The Court: That in the sandblasting operations which they knew or should have known would be carried on on the barge by Amherst Barge Company for the purpose of the work that was then being done on the barge that many men would work on the barge in the manner Goett was working.

Three: That under these circumstances it was negligence for Union Carbide and Carbon Corporation to omit equipping the barge with reasonably effective and available safety and rescue equipment.

Four: The barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used.

Five: Failure to provide rescue equipment was the proximate cause of Goett's death.

Findings of fact as to damages: the court finds that the amount which is fair and just to cover the intangible damages of the deceased's family, including mental anguish and bereavement, is the sum of $5,000, that in addition to damages for those elements the court finds that the distributees suffered financial and pecuniary loss in an amount exceeding, when added to the $5,000, the sum of $20,000, and that therefore under the rule of law which I apply to this case the amount of damages that are to be included in the recovery is $20,000.

I find that no punitive damages are proper in this case.

Proceeding, as was suggested, to find what would be the recovery in case the limitation set down by the West Virginia wrongful death statute is not applicable, I find these facts with reference to damages: that the reasonably expected annual earnings of Mr. Goett which would have been attributable to the expenses of his family rather than his own expenses, is $1500 a year for the entire expectancy of thirty-six years; and in arriving at that figure I take into consideration the fact that by the time of the expiration of his expectancy Mr. Goett would be a fairly old man and that he could not reasonably be expected, in view of the general health hazards of life, to earn during his entire expectancy the amount that he earned during the immediate week preceding his death, but that he probably would earn an amount for the whole length of time which would average what he made in the six months before his death, which would mean about $2800 a year, and I find that of that sum it would be reasonable to assume that he would use all but $1500 for his own maintenance expenses; so if he earned $1500 a year for thirty-six years, he would in that time earn $54,000 applicable to the expenses of his family.

I think that the present worth of that sum of money should be calculated on a four per cent basis rather than a three per cent basis. Calculated on a four per cent basis, I find that it amounts to $31,400.

I find further that the amount which is fair and just to compensate for the nurture of the deceased's daughter, who was living with him for the period of her infancy, is $5,000; and I further find that the amount which is fair and just to compensate for the pain and suffering of Mr. Goett himself and other intangible losses which are properly compensable under the rules of admiralty is $3600, all of which added together produces a total of $50,000 as the grand total, which would be a fair and just award if there were no limitation as fixed by the West Virginia statute.

Conclusions of law are as follows: I find that this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown, as I have said.

I conclude that it was the duty of the Union Carbide and Carbon Corporation under the circumstances of this case to provide both reasonable safety equipment in order to furnish workmen who worked on the barge a safe place to work, and I am thinking in that connection of measures such as life lines or stanchions, as they are called, to prevent falling off the unprotected deck; and it was also the duty of Carbide to provide reasonably suitable rescue equipment, which it was their duty to place in a position on the barge where it would be immediately available in case of need.

I find further as a conclusion of law that Union Carbide and Carbon Corporation is not responsible for any negligence, if such there was, on the part of Amherst Barge Company in not furnishing to the workmen the life jackets that made up a greater part of the testimony.

On the question of contributory negligence my conclusion is that Mr. Goett was not guilty of any negligence that contributed to his death. I, in explanation of that, conclude that it is the burden of the one alleging contributory negligence to prove that contributory negligence by a preponderance of the evidence.

Under the evidence in this case it is quite possible and just as probable to my mind that Goett may have accidentally fallen without any negligence at all on his part as that he negligently went over the side. There are many constructions on the deck, some of them close to the edge, and he may have struck one of those, and if he did there is no evidence that he was negligent in so doing.

As to the doctrine of assumption of risk, I conclude that under the circumstances of this case Goett did not assume the risk of the danger which caused his death. I think it is not necessary to decide whether he did or did not assume the risk of falling over the side of the boat. It was not the fall that caused his death. The cause of his death, as I have found in my findings of fact, was the failure of Union Carbide and Carbon Corporation to have available rescue equipment, and that is a risk which I conclude Goett did not assume.

The final conclusion of law is that the plaintiff is entitled to recover against defendant Union Carbide and Carbon Corporation in the sum of $20,000. The other findings with reference to damages are cut off by my decision that the limitation in the West Virginia statute applies to this case, so I make no conclusion of law with reference to the excess damages except to say that if my conclusion is correct that the limitation applies, that the plaintiff is therefore not entitled to recover in this action anything beyond $20,000.

June 24, 1957

Bluefield, West Virginia

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In re: Goett, Admx. v. Union Carbide & Carbon Corp.,
v. Amherst Barge Company, a Corp.
Civil Action No. 1755

Gentlemen:

At the conclusion of the hearing in this case which was tried by the Court as a case in admiralty, plaintiff was awarded a judgment of $20,000 against defendant Union Carbide & Carbon Corporation. No decision was made at that time with reference to the rights if any, of that defendant against the third-party defendant, Amherst Barge Company. Counsel for the third-party plaintiff and the third-party defendant were requested to file briefs, which they have done.

In connection with the brief of the third-party plaintiff the Court was asked to make certain findings of fact and conclusions of law.

Requested finding of fact is as follows

"The Court finds that Amherst Barge Company, third-party defendant herein, had exclusive custody, care and control of the unmanned tank barge CC-204 at the time Mr. Goett, plaintiff's decedent, fell therefrom."

I now make this finding of fact, deleting therefrom however the word "unmanned," since it is my opinion that the barge was not at the time an unmanned barge.

Other requested findings, which I deem to be findings of fact but which are requested as conclusions of law, are to the effect that the third-party defendant was negligent in not furnishing a life jacket to Mr. Goett and requiring him to wear it while performing his work; and in not erecting stanchions or railing around the edge of the deck of the barge.

I have already found as a fact that no negligent act of the third-party defendant contributed proximately to cause the death of Mr. Goett. I now further find as a fact that under all the circumstances disclosed by the evidence the third-party defendant was not negligent in not furnishing the life jacket and requiring Goett to wear it. I further find that while the preponderance of the evidence, in my opinion, did not show that the absence of stanchions or railing contributed proximately to Goett's death, the third-party plaintiff, and not the third-party defendant, was negligent in not erecting such stanchions or railing.

Having made these findings of fact, counsel are advised that I have carefully considered the briefs submitted to me, the authorities cited, and the arguments made; and my conclusion of law is that there is no liability from the third-party defendant to the third-party plaintiff arising out of the judgment herein awarded to plaintiff Ellen Goett, Administratrix, etc., against defendant Union Carbide & Carbon Corporation.

It is suggested in the brief of the third-party plaintiff that the court may wish to hear evidence as to whether or not Amherst purchased the insurance required by its contract with Carbide.

I am of opinion that the contract is not in any sense ambiguous, and further, that it is immaterial to the decision of the present controversy whether Amherst did or did not purchase such insurance.

An order may be entered in accordance with the views expressed in this letter.

Yours truly,

BEN MOORE,
United States District Judge.

Opinion of the United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7588

UNION CARBIDE CORPORATION, a corporation,
Defendant and Third Party Plaintiff below, Appellant and Cross-Appellee,

versus

ELLEN GOETT, as Administratrix of the Estate of Marvin Paul Goett, deceased,
Plaintiff below, Appellee and Cross-Appellant,

and

AMHERST BARGE COMPANY, a corporation,
Third Party Defendant below, Appellee.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON

(Argued April 9, 1958 Decided May 27, 1958)

Before:

SOBELOFF, *Chief Judge*, SOPER, *Circuit Judge* and THOMSEN, *District Judge*.

CHARLES M. LOVE (DAYTON, CAMPBELL & LOVE, and CHARLES R. MCELWEE on brief) for Union Carbide Corporation, Appellant and Cross-Appellee; HARVEY GOLDSTEIN (E. FRANKLIN PAULEY and S. ELDRIDGE SAMPLINER on brief) for Ellen Goett, as Administratrix etc., Appellee and Cross-Appellant; and DAVID D. JOHNSON (JACKSON, KELLY, HOLT & O'FARRELL, and W. T. O'FARRELL on brief) for Amherst Barge Company, Appellee.

THOMSEN, *District Judge*:

Marvin Paul Goett, an employee of Amherst Barge Company, while sandblasting a tank barge owned by Union Carbide & Carbon Corporation, fell into the Kanawha River and was drowned. The barge had been turned over to Amherst for repairs and improvements and was under its sole control. Since the barge was an unmanned barge, it had no life rings or other rescue equipment. The principal question to be decided on this appeal is whether Carbide is liable to Goett's administratrix either for negligence or unseaworthiness because the barge was not so equipped.

Carbide was the owner of the CC-204, an unmanned steel tank barge, with a flat deck. Except for pipe lines it had no superstructure of any kind, but there were kevels along the outer edges of the deck to assist in mooring. It had no railing around its deck and was not equipped with any life rings or similar rescue equipment. Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys [1], and it is not customary for such barges to be so equipped. The barge and its equipment had been inspected, certified and approved by the Coast Guard; the certificate of inspection issued on April 1, 1955, granted permission for navigation as an unmanned

[1] 14 U. S. C. A. 63; 46 C.F.R. 31.15-5, 32.01-10, 33.40-5 (now 33.40-10).

tank barge on rivers and inland waters tributary to the Gulf of Mexico, approved for use without equipment other than fire extinguishers.

Amherst owns and operates a repair dock, with marine ways on the Kanawha River at Reed, West Virginia. In October, 1955, Carbide contracted with Amherst for a biennial drydocking, certain welding, repairs and improvements to the barge, including installation of twenty-four Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides, with preparation for the painting by means of sandblasting. The work was to be done in accordance with Carbide's written specifications. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications.

In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 2. Carbide's supervisor of barge maintenance went on board the barge on the following day with Amherst's maintenance superintendent, to point out and discuss the work that was to be done.

No officer, crewman, watchman or other person employed by Carbide was left on or with the barge after it was delivered to Amherst; it was in the exclusive care, custody and control of Amherst on October 5, when Goett was drowned. The barge was then afloat on the Kanawha River, lying along shore, near Amherst's marine ways; it was moored to and against the head of a digger boat, which lay downstream from the barge. The digger boat was attached to the shore by a semi-permanent ramp, which was the means of access to the barge from the shore. A ring-type life buoy with a line attached was mounted on the digger boat.

Goett, an employee of Amherst, while sandblasting the deck surface of the barge, fell into the Kanawha River and was drowned. He had been on the barge on October 4 to move the sandblasting equipment aboard, and began work in the morning of October 5. The sandblasting equipment consisted of a heavy machine sitting on the deck of the barge, but movable from place to place, with two hoses leading from the machine. Goett was holding the nozzle of one of the hoses in his hands, and was directing the sandblast against the surface of the deck while he walked slowly across it. He was wearing a canvas hood over his head and shoulders to protect him against flying sand from the sandblaster and was also wearing a respirator. He was not wearing a life jacket, although life jackets were available in Amherst's supply house to any employee who desired to wear one while at work. The great majority of Amherst's employees preferred not to wear life jackets, and they were not required to do so. When last seen on the barge, Goett was walking slowly backward towards a kevel at the outboard edge of the barge. A minute later Goett's fellow workmen on the barge heard the noise of the nozzle thrashing against the side, ran to the edge of the barge and looked over. Goett was in the river, just outboard of the position in which he was last seen on the barge. Three men immediately went into the river to save him, but Goett fought them off and prevented them from keeping a grip on him. After several minutes he slipped beneath the surface and was drowned. About that time, Amherst's maintenance superintendent arrived on the scene and threw a life buoy off the digger boat into the water, but it was too late.

Goett's administratrix filed a civil action against Carbide in the Southern District of West Virginia based upon the West Virginia Wrongful Death Statute,[2] alleging that

[2] W. Va. Code, 1955: "§ 5474. [5] Action for Wrongful Death—Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his death. * * * "

"§ 5475. [6] Party Plaintiff in Such Action; Damages; Distribution; Limitation.—Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate, left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just not exceeding ten thousand dollars: Provided, however, if the plaintiff in such action shall prove by a preponderance of the evidence financial or pecuniary loss sustained by a distributee or distributees of such deceased person in an amount exceeding the sum of ten thousand dollars the jury may give such damages as shall equal such financial or pecuniary loss, not exceeding twenty thousand dollars as the total of all damages recoverable in such action, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. Every such action shall be commenced within two years after the death of such deceased person."

"§5477. [8] When Action Not to Abate; Survival of Action for Personal Injury against Wrongdoer; Time Within Such Action Must Be Brought.—Where an action is brought by a person injured for damage caused by the wrongful act, neglect or default of any person or corporation, and the person injured dies pending the action, the action shall not abate by reason of his death but, his death being suggested, it may be revived in the name of his personal representative, and the declaration and other pleadings shall be amended so as to conform to an action under sections five and six of this article, and the case proceeded with as if the action had been brought under said sections. But in such case there shall be but one recovery for the same injury. * * * "

Goett's death was due to the failure of Carbide to have rescue equipment aboard the barge. Carbide brought in Amherst as a third party defendant, alleging that by express and implied contract, it was entitled to indemnity. Answers were filed by Carbide and by Amherst, denying liability and raising the defenses of contributory negligence and assumption of risk. On plaintiff's motion, over the objection of Carbide and Amherst, the case was transferred to the admiralty side of the court.

The district judge found as facts: that Carbide should have foreseen that many of Amherst's employees would work on the barge; that under these circumstances it was negligence for Carbide not to equip the barge with safety and rescue equipment; that the barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used; that failure to provide rescue equipment was the proximate cause of Goett's death; and that Amherst had exclusive custody, care and control of the barge at the time Goett fell therefrom.

The judge concluded: "this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown * * *"; that it was the duty of Carbide to furnish workmen who worked on the barge a safe place to work, and to that end to provide safety equipment, such as life lines or stanchions, to prevent their falling off the unprotected deck; that it was also the duty of Carbide to provide reasonably suitable rescue equipment, and to place such equipment in a position on the barge where it would be immediately available in case of need; that Goett was not guilty of any negligence contributing to his death; that Goett did not assume the risk of the failure of Carbide to have rescue equipment available; that plaintiff is entitled to recover $20,000 against Carbide, but that if the limitation in the West Virginia Wrongful Death Act did not apply, plaintiff would have been entitled to recover $50,000; and that Carbide is not entitled to indemnity from Amherst.

The maritime law does not allow recovery for wrongful death. *The Harrisburg*, 119 U. S. 199. In 1920 Congress adopted an act to provide a remedy for wrongful death on the high seas, 46 U. S. C. A. 761 et seq., but there is no similar act where the death occurs on inland waters, unless the claim is against the employer of a deceased seaman and therefore covered by the Jones Act, 46 U. S. C. A. 688. The Supreme Court has held, however, that "where death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given." *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 242; *Levinson* v. *Deupree*, 345 U. S. 648, 650. The West Virginia Wrongful Death Act, like other statutes patterned on Lord Campbell's Act, has created a new cause of action for the benefit of certain named beneficiaries, and has not perpetuated the cause of action which the deceased had before his death. *Dunsmore* v. *Hartman*, 140 W. Va. 357, 84 S. E. 2d 137; *Gulf, C & S. F. T. Co.* v. *McGinnis*, 228 U. S. 173; *Continental Casualty Co.* v. *The Benny Skou*, 4 Cir., 200 F. 2d 246, 248, *cert. den.* 345 U. S. 992.

The right to maintain such a suit can be enforced in admiralty only in accordance with the substantive law of the state whose statute is being adopted. The endowment must be taken *cum onere*. *The Harrisburg*; *Levinson* v. *Deupree*; *Continental Casualty Co.* v. *The Benny Skou*; *Garrett* v. *Moore-McCormack Co., Inc.*, 317 U. S. 239, 245; *Curtis* v. *A. Garcia y Cia*, 3 Cir., 241 F. 2d 30, 35. It has been generally held that any limitations in the state statute as to when suit must be brought, or the amount and character of damages which may be allowed, are binding on the admiralty court. See e.g. *Western Fuel Co.* v. *Garcia*; *Continental Casualty Co.* v. *The Benny Skou*; *Quinette* v. *Bisso*, 5 Cir., 136 F. 825, *cert. den.* 199 U. S. 606. A cause of action for damages accrued prior to a decedent's death, whether based

on unseaworthiness or on negligence, will survive if the applicable state statute so provides. *Kernan* v. *American Dredging Co.*, 355 U. S. 426, at 430, n. 4; *Curtis* v. *A. Garcia y Diaz H ' and* v. *Steag, Inc.*, D. Mass., 143 F. Supp. 203; *Meade* v. *Lukset jell*, S. D. N. Y., 148 Supp. 708. Cf. *Cox* v. *Roth*, 348 U. S. 207; *Just* v. *Chambers*, 312 U. S. 383. Unlike statutes in some states, the pertinent West Virginia statute permits such survival only if an action has been commenced before the decedent's death, and requires that such action be conformed to an action for wrongful death. W. Va. Code, 1955, § 5477. [8]; *Railing* v. *Case*, N. D. W. Va., 131 F. Supp. 754; *Alloy* v. *Hennis Freight Lines*, 139 W. Va. 480, 80 S. E. 2d 514. Of course, no such action was filed by Goett.

In the instant case liability for Goett's death is claimed on the basis both of unseaworthiness and of negligence.

A. There is a division of opinion whether a suit under a statute like the West Virginia Wrongful Death Act can be based on unseaworthiness. Cf. *Lee* v. *Pure Oil*, 6 Cir., 218 F. 2d 711, 714, and *Graham* v. *A. Lusi, Ltd.*, 5 Cir., 206 F. 2d 223, with *Halecki* v. *United New York*, 2 Cir., 251 F. 2d 708, and *Skovgaard* v. *The M/V Tungus*, 3 Cir., 252 F. 2d 14, noting the strong dissents in both *Halecki* and *Skovgaard*. See also *Kernan* v. *American Dredging Co.*

It is not necessary for us to decide whether a suit in admiralty under the West Virginia Act can ever be based upon unseaworthiness, because Goett was not a person to whom the warranty of seaworthiness ran, and because we do not agree with the finding of the district judge that the barge was unseaworthy.

The right to sue for injuries caused by unseaworthiness, which seamen have had since *The Osceola*, 189 U. S. 158, was extended to stevedores in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 99, because they were "doing a seaman's work and incurring a seaman's hazards", and to carpenters in *Pope & Talbot* v. *Hawn*, 346 U. S. 400, 413, because: "The

ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law." See also *Alaska S.S. Co.* v. *Petterson*, 347 U. S. 396, and *Rogers* v. *United States Lines*, 347 U. S. 984. We extended the right to a watchman, supplied by an independent contractor, who was doing work customarily done by an officer or member of the crew. *Ross* v. *The Zeeland*, 4 Cir., 240 F. 2d 820.

Since the decision below, however, this court has adopted the opinion of Judge Chesnut in *Raidy* v. *United States*, D. Md., 153 F. Supp. 777, aff'd, 4 Cir., 252 F. 2d 117, wherein he noted that the admiralty doctrine of unseaworthiness sprang from a consideration of the particular hazards affecting the crew of a ship in navigation. Raidy was a shipyard worker who was performing duties not within the competence or the customary activities of the crew. The ship was in drydock for structural changes; she was not subject to any of the perils of navigation. The crew had been discharged. The owner maintained no control over the work being done by the independent contractor other than the right to inspect to determine whether structural changes were being performed in accordance with the specifications. We concluded that Raidy's status was very different from that of a seaman and that it was a "misnomer" to speak of the removable and absent footplate through which he fell as "unseaworthiness of the ship." 252 F. 2d at 118. See also *Berryhill* v. *Pacific*, 9 Cir., 238 F. 2d 385, *cert. den.* 354 U. S. 938; *West* v. *United States*, E. D. Pa., 143 F. Supp. 473; *Berge* v. *National Bulk Carriers*, 2 Cir., 251 F. 2d 717. Cf. *Halecki* v. *United New York* and *Skovgaard* v. *The M/V Tungus*.

In *Sieracki*, *Hawn* and *Petterson*, the vessels were in the general control of their officers, loading cargo, when the longshoremen and carpenters were hurt. Those cases hold that an owner's duty to provide a seaworthy vessel, with appurtenant supplies and equipment, is not affected by the relinquishment to another, such as a stevedoring company, of control of a portion of the ship or of a particular operation, such as loading.[3] In the instant case, however, the barge had been temporarily withdrawn from navigation and delivered into the sole custody and control of Amherst, the drydock company. While in extent the work was not as great as in *Berryhill*, *Beige* and *Raidy*, in character it was the same, because it could not be done by the regular crew, but required that the vessel be withdrawn from navigation and turned over to a drydock company having special facilities and equipment for the work. The work order called for drydocking of the vessel; without such drydocking the bottom and sides of the barge would not have been inaccessible. The warranty of seaworthiness does not apply in that situation.

The barge was not unseaworthy. In its ordinary operations, it was unmanned, and did not require life saving equipment. It did not become unseaworthy when men went aboard after it had been turned over to a repair yard under the circumstances of this case. *Lester* v. *United States*, 2 Cir., 234 F. 2d 625, *cert. den.* 352 U. S. 889.

B. Nor was Carbide negligent in delivering the barge to Amherst without mounting life rings or other safety equipment on the barge, or in failing to rescue Goett after he fell into the river, as contended by his administratrix. There is, of course, a duty on a vessel and her owners to have life saving equipment available to rescue members of her crew who fall overboard while the vessel is in operation. *Sadley* v. *Pennsylvania*, 4 Cir., 159 F. 2d 784, and cases cited. A

[3] See discussion in *Alaska S.S. Co.* v. *Petterson*, 205 F. 2d 478, at 479.

similar duty is owed to business visitors who come aboard while the vessel is in the custody and control of her officers or other representatives of the owners. But in the instant case Carbide had delivered the barge into the sole custody and control of Amherst. Carbide's duty under those circumstances was to warn Amherst and its employees of any hidden danger or latent defect. There was no hidden danger or latent defect in the barge. It was the duty of Amherst to supply its employees with a reasonably safe place in which to work. It knew and controlled the conditions of the work and the equipment which would be used. It was Amherst's responsibility to decide whether a temporary railing or stanchions should be erected, whether its men should be required to wear preservers, and whether and where life rings and other rescue equipment should be mounted. For negligence in any of these respects it would be liable to plaintiff herein for damages, were it not for the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901-950.[4] But Carbide is not liable to plaintiff for negligence; it breached no duty it owed to Goett. *Lester* v. *United States; West.* v. *United States; Raidy* v. *United States;* 38 Am. Jur., Negligence, sec. 97; Restatement, Torts, sec. 340, 343; Harper and James, *The Law of Torts*, vol. 2, sec. 21.1.

The judgment should have been entered in favor of defendant. This decision makes it unnecessary to pass on the other questions raised by the several parties.

Reversed.

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[4] Under the terms of that Act Goett's wife and children are now entitled to receive, without proof of negligence on anyone's part, compensation which may exceed the maximum amount recoverable under the West Virginia Wrongful Death Act.

Judgment

Filed and Entered May 27, 1958.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7588

UNION CARBIDE CORPORATION, a corporation, Defendant and Third Party Plaintiff below,
Appellant and Cross-Appellee,

vs.

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased, Plaintiff below,
Appellee and Cross-Appellant,

and

AMHERST BARGE COMPANY, a corporation, Third Party Defendant below,
Appellee.

Cross-appeals from the United States District Court for the Southern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; that this cause be, and

the same is hereby, remanded to the United States District Court for the Southern District of West Virginia, at Charleston, with direction to enter judgment in favor of defendant (appellant and cross-appellee here) in accordance with the opinion of the Court filed herein; and that the costs on appeal be paid by the appellee and cross-appellant.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

MORRIS A. SOPER
United States Circuit Judge.

ROSZEL C. THOMSEN
United States District Judge.

Office-Supreme Court, U.S.
FILED
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 3

ELLEN GOETT, Administratrix of the Estate of MARVIN PAUL GOETT, deceased,

Petitioner,

against

UNION CARBIDE CORPORATION and AMHERST BARGE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 3

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased,

Petitioner,

against

UNION CARBIDE CORPORATION and AMHERST BARGE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the United States Court of Appeals for the Fourth Circuit (R. 241-250) is reported at 256 F. 2d 449.

Jurisdiction

The judgment of said Court of Appeals was entered on May 27, 1958. The petition for a Writ of Certiorari was filed on August 25, 1958, and was granted on March 2, 1959. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

Questions Presented

1. Whether, in an action for the wrongful death of a maritime worker arising out of a maritime tort, the general maritime law provided a remedy in the absence of a Federal or State Statute, unlike the "death maxim" of the common law.

2. Whether under the Wrongful Death Statute of West Virginia, maritime and not local principles of law were applicable with respect to the issues of assumption of risk and the duties of the litigants.

3. Whether the Wrongful Death Statute of West Virginia provided a remedy for breach of the warranty of seaworthiness.

4. Whether the shipowner, with knowledge that workers were to come aboard its vessel, breached its warranty of seaworthiness by failing to provide safety rescue equipment on the ship upon its delivery to the independent contractor for the work to be thereafter performed.

5. Whether the shipowner's warranty of seaworthiness encompassed employees of an independent contractor after delivery of the vessel for its periodic painting and minor repairs, work traditionally performed by seamen.

6. Whether, in this action for wrongful death of a maritime worker, arising out of a maritime tort and predicated upon the general maritime law as supplemented by the Wrongful Death Statute of West Virginia, the State Statutory maximum monetary limitation was unenforceable as contrary to the essential characteristics of the general maritime law and against its public policy of uniformity in its international and interstate relations.

Statutes Involved

Petitioner, as administratrix, sued to recover money damages for wrongful death and personal injuries grounded upon the Admiralty and Maritime jurisdiction, as supple-

mented by the Wrongful Death Statute of West Virginia, § 5474(5), which read as follows:

> "§ 5474. (5) Action for Wrongful Death.—Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter. * * *"

Respondent, Carbide, asserted the applicability of § 5475(6), of the West Virginia Statutes:

> "§ 5475. (6) Party Plaintiff in Such Action; Damages; Distribution; Limitation.— * * * In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars; Provided, however, if the plaintiff in such action shall prove by a preponderance of the evidence financial or pecuniary loss sustained by a distributee or distributees of such deceased person in an amount exceeding the sum of ten thousand dollars the jury may give such damages as shall equal such financial or pecuniary loss, not exceeding twenty thousand dollars as the total of all damages recoverable in such action, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. * * *"

Statement

The following facts were set out in the Court of Appeals decision, with additional bracketed matter inserted by the petitioner.

Marvin Paul Goett, an employee of Amherst Barge Company, while sandblasting a tank barge owned by Union Carbide & Carbon Corporation, fell into the Kanawha River

and was drowned. The barge had been turned over to Amherst for repairs and improvements and was under its sole control. Since the barge was an unmanned barge [when in transit], it had no life rings or other rescue equipment.

Carbide was the owner of the CC-204, an unmanned steel tank barge, with a flat deck. Except for pipe lines it had no superstructure of any kind, but there were kevels along the outer edges of the deck to assist in mooring. It had no railing around its deck and was not equipped with any life rings or similar rescue equipment. Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys [when in transit], and it is not customary for such barges to be so equipped [for actual navigation]. The barge and its equipment had been inspected, certified and approved by the Coast Guard; the certificate of inspection issued on April 1, 1955, granted permission for navigation as an unmanned tank barge on rivers and inland waters tributary to the Gulf of Mexico, approved for use without equipment other than fire extinguishers. [The Trial Court found, as a finding of fact, that the barge was manned at the time of Goett's death (R. 236-237)].

Amherst owns and operates a repair dock, with marine ways on the Kanawha River at Reed, West Virginia. In October, 1955, Carbide contracted with Amherst for a biennial drydocking, certain welding, repairs and improvements to the barge, including installation of twenty-four Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides, with preparation for the painting by means of sandblasting. [The purchase order contract called for painting and minor repairs at the total price of $4,712.60 (R. 207). Carbide conceded that they were indeed minor in its answer to plaintiff's interrogatories, #24 (R. 18)]. The work was to be done in accordance with Carbide's written specifica-

tions. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications.

In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 2. Carbide's supervisor of barge maintenance went on board the barge on the following day with Amherst's maintenance superintendent, to point out and discuss the work that was to be done.

No officer, crewman, watchman or other person employed by Carbide was left on or with the barge after it was delivered to Amherst; it was in the exclusive care, custody and control of Amherst on October 5, when Goett was drowned. The barge was then afloat on the Kanawha River, lying along shore, near Amherst's marine ways; it was moored to and against the head of a digger boat which lay downstream from the barge. The digger boat was attached to the shore by a semi-permanent ramp which was the means of access to the barge from the shore. A ring-type life buoy with a line attached was mounted on the digger boat.

Goett, an employee of Amherst, while sandblasting the deck surface of the barge, fell into the Kanawha River and was drowned. He had been on the barge on October 4 to move the sandblasting equipment aboard, and began work in the morning of October 5. The sandblasting equipment consisted of a heavy machine sitting on the deck of the barge, but movable from place to place, with two hoses leading from the machine. Goett was holding the nozzle of one of the hoses in his hands, and was directing the sandblast against the surface of the deck while he walked slowly across it. He was wearing a canvas hood over his head and shoulders to protect him against flying sand from the sandblaster and was also wearing a respira-

tor. He was not wearing a life jacket [concededly hazardous to the wearer (R. 154)], although life jackets were available in Amherst's supply house to any employee who desired to wear one while at work. [There was no evidence that Goett even knew of their existence. Other employees aboard the barge had no knowledge of their existence or availability (R. 58, 60, 65, 67)]. The great majority of Amherst's employees preferred not to wear life jackets, and they were not required to do so [because of the danger involved]. When last seen on the barge, Goett was walking slowly backward towards a kevel at the outboard edge of the barge. A minute later Goett's fellow workmen on the barge heard the noise of the nozzle thrashing against the side, ran to the edge of the barge and looked over. Goett was in the river, just outboard of the position in which he was last seen on the barge. Three men immediately went into the river to save him, but Goett fought them off [due to panic] and prevented them from keeping a grip on him. After several minutes he slipped beneath the surface and was drowned. About that time, Amherst's maintenance superintendent arrived on the scene and threw a life buoy off the digger boat into the water, but it was too late.

[The manner of obtaining the life buoy on the digger boat, which was not thought of by the various workers in the excitement of the moment (R. 45), was explained by Martin, Amherst's superintendent—to run 160 feet from where Goett fell to the edge of the barge, step from the barge to a ramp 12 feet wide, step over a guard rail to a stairway of 11 steps and then go 15 feet to the preserver and finally retrace the entire route holding the preserver (R. 101-102).]

Goett's administratrix filed a civil action against Carbide in the Southern District of West Virginia based upon the West Virginia Wrongful Death Statute. [The action was predicated upon the general maritime law as supplemented by the remedy afforded by the state Wrong-

ful Death Statute] alleging that Goett's death was due to the failure of Carbide to have rescue equipment aboard the barge. Carbide brought in Amherst as a third party defendant, alleging that by express and implied contract, it was entitled to indemnity. [A petition for limitation in Admiralty was filed by Carbide and was stayed pending the determination herein.] Answers were filed by Carbide and by Amherst, denying liability and raising the defenses of contributory negligence and assumption of risk. On plaintiff's motion, over the objection of Carbide and Amherst, the case was transferred to the Admiralty side of the court.

The district judge found as facts: that Carbide should have foreseen that many of Amherst's employees would work on the barge; that under these circumstances it was negligence for Carbide not to equip the barge with safety and rescue equipment; that the barge was not seaworthy at the time Goett was drowned for all the circumstances in which it was being used; that failure to provide rescue equipment was the proximate cause of Goett's death; and that Amherst had exclusive custody, care and control of the barge at the time Goett fell therefrom.

The judge concluded: "this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown * * *"; that it was the duty of Carbide to furnish workmen who worked on the barge a safe place to work, and to that end to provide safety equipment, such as life lines or stanchions, to prevent their falling off the unprotected deck; that it was also the duty of Carbide to provide reasonably suitable rescue equipment, and to place such equipment in a position on the barge where it would be immediately available in case of need; that Goett was not guilty of any negligence contributing to his death; that Goett did not assume the risk of the failure of Carbide to have rescue equipment available; that plaintiff is entitled to recover $20,000 against Carbide, but that if the limitation in the West Virginia

Wrongful Death Act did not apply, plaintiff would have been entitled to recover $50,000; and that Carbide is not entitled to indemnity from Amherst.[1]

The opinion of the Trial Court was handed down at the close of the trial on May 13, 1957. On June 24, 1957, further findings and conclusions were incorporated in a letter by the Trial Judge to counsel for all parties.

On August 24, 1957, a decree was entered awarding the petitioner the sum set forth above.

On September 23, 1957, Carbide appealed from the decree and on October 1, 1957, petitioner cross-appealed.

Petitioner's motion for certification of the questions involved in the cross-appeal was denied on March 3, 1958.

Argument of the appeal and cross-appeal was heard on April 9, 1958, in the United States Court of Appeals for the Fourth Circuit before Chief Judge Sobeloff, Circuit Judge Soper and District Judge Thomsen.

The opinion of the Court, by District Judge Thomsen, was filed on May 27, 1958.

On a second motion for certification of the questions, denied on June 18, 1958, the mandate to the District Court was stayed pending the timely filing of the petition for a Writ of Certiorari.

Summary of Argument

1. The "death maxim" of the common law which destroyed a cause of action at the death of either party cannot be socially or morally defended. The abatement rule was not part of the general maritime law as it was and is known in the civil law nations of Continental Europe. Brought into common law England, the Admiralty Courts became a pawn in the struggle for power between Parliament (joined by the judiciary) and the monarchy, result-

[1] Close of facts set forth in the Court of Appeals' opinion.

ing in the eventual subservient position and merger of the ancient Admiralty jurisdiction into the common law of England.

The American colonies, not having accepted the narrow Admiralty jurisdiction as practiced in England and having followed the much wider jurisdictional scope of the ancient maritime law, this Court erred in *The Harrisburgh*, 119 U. S. 199, in holding that the general maritime law of the United States did not afford a remedy for the wrongful death of a maritime worker in absence of a Federal or State Statute.

2. The duty of the shipowner to those business invitees employed aboard its vessel was to afford them a safe place to work. Having knowledge of the conditions which would prevail aboard the vessel after its delivery, the owner had the responsibility to ascertain that the manner and method of completing the work was proper. The question of whether the shipowner acted in a careful manner so as to determine whether the manner and method of performing the work was safe was within the province of the triers of the facts.

The duty of the shipowner was not merely to warn the workers of dangers but to provide the safety required for the operation. The principles involved were those of the general maritime law and not the local common law doctrine. As such, the defense of assumption of the risk was not present since there was no voluntary choice of safe or unsafe condition or method of work given to the workers employed on the vessel.

The shipowner thus failed to provide a safe manner and method of performing the work, knowing of the conditions aboard the vessel at the time. Under the Wrongful Death Statute of West Virginia maritime workers were entitled to the same rights under law as they would have had if only injured. The common law doctrine of assumption of risk was therefore inapplicable. The findings of the District Court should have been affirmed.

3. The Wrongful Death Statute of West Virginia employing the language, "wrongful act, neglect, or default", permitted an action for wrongful death arising out of a breach of the warranty of seaworthiness in accordance with the decision of the Court of Appeals for the Fourth Circuit in *Holley* v. *S.S. Manfred*, decided July 9, 1959 (not reported to date).

4. The vessel was unseaworthy at the time of the death of the decedent, a business invitee, unqualified by the fact that the vessel was delivered by the shipowner to the independent contractor and was under the latter's supervision. The relinquishment of control doctrine has been repudiated by this Court in view of the shipowner's non-delegable, absolute duty to provide a seaworthy vessel. The fact that the vessel was seaworthy during transit did not free the shipowner of the duty after delivery of the vessel; nor can the change in the conditions aboard the ship permit the owner to escape liability by delegating the work to others.

5. The duty to provide a seaworthy vessel flowed to the class of harbor workers who were doing work traditionally performed by seamen. The deceased herein was sandblasting the deck of the vessel in prepartion for its being painted. Painting and its prior preparation has always been the duty of various crew members to whom the protection of the doctrine was given. The shipowner's conceded failure to provide the safety rescue equipment was a breach of that duty and was actionable under the Wrongful Death Statute of West Virginia.

6. The right of a State Wrongful Death Statute in supplementing the general maritime law and providing a remedy for the wrongful death had to be accepted with its limitations and conditions, subject however to it not being in conflict with the essential characteristics of the general maritime law in its international and interstate relations. The rule is similar to the right of any *forum* to reject the application of a statute of a foreign *lex loci* against its public policy.

The limitation of maximum monetary recovery was contrary to the public policy of the general maritime law, *Workman v. New York*, 179 U. S. 552, and as such was inapplicable and unenforceable in an action within the Admiralty and Maritime jurisdiction.

ARGUMENT

POINT I

In an action for the wrongful death of a maritime worker arising out of a maritime tort, the general maritime law provided a remedy in the absence of a Federal or State Statute, unlike the "death maxim" of the common law.

The common law "death maxim" calling for abatement of a cause upon the death of either the wronged party or the tortfeasor has played a unique roll in English and American jurisprudence. Petitioner knows of no other rule of law so maligned, more strongly criticized without defense or defenders, so often the cause for legislative effort to effect equitable change.[2]

The abatement rule cannot be morally defended in the Maritime setting. Nor can it be sustained as a proposition of law.

In 1886 this Court in *The Harrisburg*, 119 U. S. 199, considered the question of whether a suit *in rem* would lie for the death of an officer of a vessel off the coast of Massachusetts. The vessel was registered out of Philadelphia.

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[2]2Wrongful Death Statutes of every State, the Federal Employers' Liability Act 45 U. S. C. § 51, the Jones Act 46 U. S. C. § 688, the Death on the High Seas Act 46 U. S. C. § 761 and the many State Compensation Statutes.

The death of a maritime harbor worker aboard a vessel within State territorial waters represents the last area of strength of the "maxim".

Both Massachusetts and Pennsylvania had Wrongful Death Statutes having one year statutes of limitation. Suit was brought five years after.

This Court stated the issues to be:

(a) Whether a death action would lie in Admiralty in absence of a Federal or State statute,

(b) If not, whether an action would lie when right of action was given by a State statute, and

(c) If so, whether the State statute of limitations would prevail?

The Court first conceded that under Scottish or French law (long acknowledged as a leading nation in maritime matters among all non-English speaking peoples, *Benedict on Admiralty*, Vol. 4, §§ 669, 736) recovery would be permitted (pp. 212-213). The question of whether the English maritime law merged with, or succumbed to the demands of, the common law was discussed, the Court holding that no English case could be found stating that the rule in Admiralty differed from that at common law (p. 205).

The question actually raised by the Court was whether the Admiralty was governed by the common law rule in this country. To that end the Court discussed various cases, arriving at the conclusion that the causes permitting a remedy did so on the basis of equity and natural principles of justice and not on any specific rule of law. The Court further held that since no country was shown to have adopted a different rule for the sea from that which it maintained on the land, the rights of persons under the maritime law of the United States were not different from those under the common law (pp. 213-214).

Thus—the Court held that (1) no country had a different rule in Admiralty than in its land legal system; (2) in England the rule in Admiralty was that of the com-

mon law; (3) the United States followed the common law rule on land, therefore it should be followed in Admiralty.

Shrouded in the mists of feudal England, it is now generally believed that the "logic" of the death maxim was rooted in the theory of trespass as an intentional tort, and guided by the "passion of revenge".[3] *Justice Oliver Wendell Holmes, Jr.*, "The Common Law", 1948 Edition, pages 5, 34, 35. As such, "death was the great composer of strife".

Concededly maritime law was brought into England from the neighboring port cities of Continental Europe and came down to us as the law of the sea, *Benedict on Admiralty*, Vol. 4, §§ 665-670, pages 343-358, modified only by the demands of an industrial civilization.

Admiralty principles were perfected and first codified by the Romans, becoming part of the civil law as it was and still is practiced by Continental European Nations. *Benedict on Admiralty*, Vol. 4, § 671, page 358:

> "§ 671. The Civil Law
>
> The admiralty law is indebted for many of its characteristics to the circumstances of the countries in which it was first administered. The countries that earliest reduced the law of the sea to a system, and adopted codes of maritime regulations, having been countries in which the Roman or civil law prevailed, the principles of that great system of jurisprudence were incorporated with, and gave character to, the maritime law; and so much were pure reason, abstract right, and practical justice mingled in that system, and so important was it that the general maritime law should be uniform and universal, that in England, where the common law was the law of the land, the civil law was held to be the law of the admiralty, and the course of proceedings in admiralty closely resembled the civil law practice."

[3] The theory of "trespass on the case" which first distinguished between the intentional and the unintentional tort was not yet developed.

And again at Vol. 1, § 1, page 2:

> "The maritime law is not a branch or outgrowth of the common law but takes its character from the civil law."

In the 14th century, the Admiralty Court was established in England marking, for the first time, any effort by that country to formulate a national maritime law. *Benedict*, Vol. 4, § 672, page 359. The Admiralty jurisdiction became one of the King's Prerogatives, an expansion of the King's position of strength against the power of the common law Courts, which had politically sided with Parliament. Thus was born the central theme of the 16th and 17th century struggle for power between Parliament supported by the judiciary and the monarchy.

The 15th century was marked by a rise in the desire for a powerful Parliament and an increase in the power of the King's Council, as the seat of equitable judicial power to grant relief not afforded by the common law Courts. Parliament strove for the independence of the judiciary from the King's Prerogatives, which would indirectly strengthen its position against the monarchy.

The two century struggle between the common law Courts and the Admiralty in England, resulting in the latter's submission after 1664, has been discussed by text writers and by the judiciary in explanation of its decisions. See: *Benedict*, Vol. 4, §§ 690-699, pages 375-397.

Insurance v. *Dunham*, 78 U. S. 1 on pages 23 and 24 discussed the Admiralty jurisdiction both in England and the United States, describing the result of the strife as follows:

> "Much controversy has arisen with regard to the extent of this jurisdiction. It is well known that in England great jealousy of the admiralty was long exhibited by the courts of common law.

> The admiralty courts were originally established in that and other maritime countries of Europe for the protection of commerce and the administration of that venerable law of the sea which reaches back to sources long anterior even to those of the civil law itself; which Lord Mansfield says is not the law of any particular country, but the general law of nations; and which is founded on the broadest principles of equity and justice, deriving, however, much of its completeness and symmetry, as well as its modes of proceeding, from the civil law, and embracing, altogether, a system of regulations embodied and matured by the combined efforts of the most enlightened commercial nations of the world. Its system of procedure has been established for ages, and is essentially founded, as we have said, on the civil law; and this is probably one reason why so much hostility was exhibited against the admiralty by the courts of common law, and why its jurisdiction was so much more crippled and restricted in England than in any other state. In all other countries bordering on the Mediterranean or the Atlantic the marine courts, whether under the name of admiralty courts or otherwise, are generally invested with jurisdiction of all matters arising in marine commerce, as well as other marine matters of public concern, such as crimes committed on the sea, captures, and even naval affairs. But in England, partly under strained constructions of parliamentary enactments and partly from assumptions of public policy, the common law courts succeeded in establishing the general rule that the jurisdiction of the admiralty was confined to the *high* seas and entirely excluded from transactions arising on waters within the body of a county, such as rivers, inlets, and arms of the sea as far out as the naked eye could discern objects from shore to shore, as well as from transactions arising on the land, though relating to marine affairs." (pp. 23-24).

The boundaries of Admiralty jurisdiction wildly fluctuated with each succeeding political upheaval. During

periods of broad jurisdiction the law of Continental Europe was observed under civil law principles.[4]

Waring v. *Clarke*, 46 U. S. 441, affirmed that the Admiralty jurisdiction of England had been narrowed by the controversy under the leadership of Lord Coke; that the ancient jurisdiction was much wider than that under the rule of the common law which had emasculated the jurisdictional scope of its enemy.

The American colonies, populated with people who had fled England, were not content to establish their Admiralty jurisdiction upon the oppressive English model. *Benedict*, Vol. 1, § 8. page 9:

> "§ 8. *Origin of Admiralty and Maritime Jurisdiction.*
>
> Unlike the common law, the American admiralty is not a derivation of English jurisprudence but of the general maritime law adapted to our circumstances and molded by our practice. The admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England—or by the local traditions of that land—but is to be interpreted by an original view of its essential nature and objects and with reference to analogous jurisdiction in other countries constituting the maritime commercial world as well as the jurisdiction in England. Those who framed the Constitution and the lawyers in America in that day were familar with a jurisdiction different and more extensive in most of the original States when they were colonies than was allowed in England."

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[4] France held a peculiarly high place of eminence in its Admiralty practice, conforming to the civil law, which was observed by all Christian nations. *Benedict*, Vol. 4, § 669, pp. 355-356. Shortly before the end of the parliamentary struggle during a period of Admiralty ascent the jurisdiction extended to "Unskilful Pilots whereby ship or man perish". *Benedict*, Vol. 4, § 696, pp. 392-396 at p. 395.

Waring v. *Clarke*, 46 U. S. 441 at pages 454-456, compared at length the English Admiralty jurisdiction with that of the several Colonial governments and the general return by the colonies to the much wider ancient jurisdiction, extended far beyond that of common law England, and more specifically in Virginia (involved herein) as follows:

> "Shall it be presumed, also, that the members of the convention were altogether disregardful of what had been the early legislation of several of the States, when they were colonies, upon admiralty jurisdiction and the rules for proceeding in such courts?—of the larger jurisdiction given by Virginia by her act of 1660, than was at that time allowed to the admiralty in England?—that it was passed in the year that the ordinance of the republican government in England expired by the restoration? That ordinance revived much of the ancient jurisdiction in admiralty. It was judicially acted upon in England for twelve years. When it expired there, the enlightened influences connected with trade and foreign commerce, 'and the uncertainty of jurisdiction in the trial of maritime causes,' which led to its enactment, no doubt had their weight in inducing Virginia, then our leading colony in commerce, to adopt by legislation many of its provisions. That ordinance and the act of Virginia have, in our view, important bearings upon the point under consideration. They were well known to those who represented Virginia in the convention. In its proceedings, they had an active and intellectual agency, which makes it very unlikely that they were unmindful of the admiralty jurisdiction in Virginia. In New York, also there was a court of admiralty, the proceedings of which were according to the course of the civil law. Maryland, too, had her admiralty, differing in jurisdiction from that of England." (pp. 455-456).

And in *Insurance* v. *Dunham*, 78 U. S. 1, as follows:

> "This court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but

is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England." (p. 24).

The various commissions to New York, Connecticut and New Jersey clearly show that the scope of their Admiralty jurisdiction far exceeded that of England. *Benedict*, Vol. 4, § 711, pages 408-419, and more specifically at page 417:

> "'And likewise with cognizance and decision of wreck of the sea, and of the death, drowning, and view of dead bodies of all persons howsoever killed or drowned, or murdered, or which shall happen to be killed, drowned, or murdered, or by any other means come to their death, in the sea, or public streams, ports, fresh waters, or creeks whatsoever, within the flowing of the sea and high water mark, throughout our aforesaid provinces and colonies, and the territories depending thereon, and maritime parts of the same, and thereto adjacent, or elsewhere within our maritime jurisdiction aforesaid."

The jurisdiction over persons was equal to the demands of Admiralty advocates of earlier days and far broader and stronger than that of England. *Benedict*, Vol. 4, § 716, pages 435-436.

And so it continued in the various states under the Articles of Confederation, *Benedict*, Vol. 4, §§ 720-724. As to the extent of the jurisdiction in Virginia:

> "§ 723. Statute of Virginia.
>
> Virginia passed an Act in 1779, as follows:
>
> 'Be it enacted by the General Assembly. That the Court of Admiralty to consist of three judges, any two of whom are declared to be a sufficient number to constitute a court, shall have jurisdiction of all maritime causes, except those wherein parties may be accused of capital offences, now depending and hereafter to be brought before them.'
>
> It was expressly provided that such court was to be 'governed in their proceedings and decisions by

> the regulations of the Congress of the United States of America; by the acts of the general assembly; by the laws of Oleron and the Rhodian and Imperial Laws, so far as they have been heretofore observed in the English Courts of Admiralty; and by the laws of nature and nations,'—a wide and beneficial jurisdiction. No one can fail to observe how distinctly the ancient ordinances and maritime laws, the civil law, and the former practices of the English Admiralty, are adopted instead of the narrow limit observed by the English Admiralty at that time." (p. 440).

The Admiralty jurisdiction in Virginia, (as followed by West Virginia) was thus predicated upon the ancient jurisdiction of the Admiralty Courts (civil law) rather than on the common law. Concededly, the former provided a remedy in an action for wrongful death.

Petitioner respectfully submits that this Court in *The Harrisburgh* erred in the following manner:

(1) The absence of proof of a different rule in the Admiralty of any country from that which it had on land stems not from lack of an Admiralty rule but because the maritime law of all non-English speaking people (Continental Europe) fused into and became part of the Roman Codes, the basis of the civil law as it was and still is practiced in Europe. As such—the remedies afforded by the Codes, some centuries before English law was promulgated, became those of the law of the sea as well.

(2) The apparent reason for the similarity of the rule in Admiralty and the common law rule in England was not a continuation of the remedies available under the civil law but rather the destruction and subversion of those rights by the common law Courts as part of the historic English political struggle of modification from an absolute to a constitutional monarchy, under the "enlightened" hand of Parliament and an established common law judiciary.

To consider the Admiralty rule as being similar to the English common law rule is self-contradiction. The bald fact is that the "death maxim" of the two systems is similar only because of the destruction of the ancient Admiralty jurisdiction in England.

(3) *Benedict on Admiralty*, as above set forth, clearly pointed out the wide chasm of legal thought existing between the mother country and her American colonies. Almost without exception each colony obtained a grant of power from the King far wider in scope than that offered in England. In effect the colonies, maritime traders, sought and received an enlightened Admiralty jurisdiction, harkening back to the ancient rules and principles of the civil law and its policy of natural justice and equity.

Waring v. *Clarke*, 46 U. S. 441 and *Insurance* v. *Dunham*, 78 U. S. 1, clearly pointed out the vast difference in thought between the two countries, differences that conclusively spelled out the desire of the framers of the Constitution to divorce the Admiralty jurisdiction from the bindings of the subservient Admiralty Courts of common law England.

The various lower Court decisions, so diligently discussed by the Court in *The Harrisburgh* grounded the grant of relief upon equity and justice, it is true, but predicated the belief of such "natural rights" upon the absence of a merger between Admiralty jurisdiction and the common law in the United States. Right or wrong, those decisions were not predicated upon a theoretical concept of justice as this Court implied, but on a proposition of law which concluded that the very merger of the two systems of law in England simply did ont occur in the United States.[5]

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[5] Even in England the Admiralty jurisdiction *in rem* was wholly different from that of the common law. This Court pointed out that *Vera Cruz*, 10 App. Cas. 59, had held the abatement rule in effect in Admiralty even after passage of England's Lord Campbell Act. Thus—a statute to modify the harshness of the "death maxim" at common law did not do so in Admiralty until a later date when the Act was revised to permit the cause of action to lie. Apparently, even in England, though there was a merger of the two systems, jurisdictional distinctions were still the subject of legal conflict.

The Court in *The Harrisburgh* reasoned it to be "the duty of courts to declare the law, not to make it * * *." (p. 214). The implication of dissatisfaction with *The Harrisburgh* result appears clear. However this Court interpreted the extent of its equitable powers in 1886, recent determinations have left little doubt but that a policy of equitable and natural justice may now be considered in arriving at a desired result.

In *Funk* v. *United States*, 290 U. S. 371, the opinion of Mr. Justice Sutherland gave meaning to the thought of modification of the rules of the common law by the judiciary when necessary to bring that law into alignment with changing concepts of justice and equity.

> "With the conclusion that the controlling rule is that of the common law, the Benson case and the Rosen case do not conflict; but both cases reject the notion, which the two earlier ones seem to accept, that the courts, in the face of greatly changed conditions, are still chained to the ancient formulae and are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of these changed conditions" (p. 379).
>
> * * * The conclusion which the court reached was based not upon any definite act of legislation, but upon the trend of congressional opinion and of legislation (that is to say of legislation generally), and upon the great weight of judicial authority which, since the earlier decisions, had developed in support of a more modern rule. In both cases the court necessarily proceeded upon the theory that the resultant modification which these important considerations had wrought in the rules of the old common law was within the power of the courts to declare and make operative" (p. 380).
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> • • •
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> "The rules of the common law which disqualified as witnesses persons having an interest, long since, in the main, have been abolished both in England and in this country; and what was once regarded as a sufficient ground for excluding the testimony of such

persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. * * *" (p. 380).

"It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion, it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possess the power, to decide it in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past? That this court has the power to do so is necessarily implicit in the opinions delivered in deciding the Benson and Rosen cases. And that implication, we think rests upon substantial ground * * *" (pp. 381, 382).

"That this court and the other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist we think is not fairly open to doubt (p. 382).

In Hurtado v. California, 110 U. S. 516, 530, this court, after suggesting that it was better not to go too far back into antiquity for the best securities of our liberties, said (p. 382):

* * *

> 'This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.
>
> '* * * and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that

the new and various experiences of our own situation and system will mould and shape it into new and and not less useful forms' " (pp. 382, 383).

• • •

"To concede this capacity for growth and change in the common law by drawing 'its inspiration from every fountain of justice,' and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a 'flexibility and capacity for growth and adaptation' which was 'the peculiar boast and excellence' of the system in the place of its origin.

The final question to which we are thus brought is not that of the power of the federal courts to amend or repeal any given rule or principle of the common law, for they neither have nor claim that power, but it is the question of the power of these courts, in the complete absence of congressional legislation on the subject, to declare and effectuate, upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced. It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions" (p. 383).

" • • • The common law by its own principles adapted itself to varying conditions and modified its own rules so as to serve the ends of justice as prompted by a course of reasoning which was guided by these generally accepted truths. One of its oldest maxims was that where the reason of a rule ceased, the rule also ceased, and it logically followed that when it occurred to the courts that a particular rule had never been founded upon reason, and that no reason existed in support thereof, that rule likewise ceased, and perhaps another sprang up in its place

> which was based upon reason and justice as then conceived. No rule of the common law could survive the reason on which it was founded. It needed no statute to change it but abrogated itself.'
>
> That court then refers to the settled doctrine that an adoption of the common law in general terms does not require, without regard to local circumstances, an unqualified application of all its rules; that the rules, as declared by the English courts at one period or another, have been controlling in this country only so far as they were suited to and in harmony with the genius, spirit and objects of American institutions; and that the rules of the common law considered proper in the eighteenth century are not necessarily so considered in the twentieth. 'Since courts have had an existence in America,' that court said (p. 708), 'they have never hesitated to take upon themselves the responsibility of saying what are the proper rules of the common law' " (p. 384).

In *Duplex* v. *Deering*, 254 U. S. 443, a matter involving the interpretation of the Clayton Act, the dissent of Mr. Justices Brandeis, Holmes and Clarke (which later became the majority view), was grounded upon this thought:

> "The change in the law by which strikes once illegal and even criminal are now recognized as lawful was effected in America largely without the intervention of legislation. This reversal of a common-law rule was not due to the rejection by the courts of one principle and the adoption in its stead of another, but to a better realization of the facts of industrial life." (p. 481)

In *Woods* v. *Lancet*, 303 N. Y. 349, the question involved was whether a cause of action would lie for personal injuries sustained by an unborn child. On appeal to the Court of Appeals of New York from an affirmance by the Appellate Division dismissing the complaint, the Court, reversing a principle of law in existence from the time of medieval England, declared:

"* * * They justify the statement in Prosser on Torts, at page 190, that: 'All writers who have discussed the problem have joined in condemning the existing rule, in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother, and urging that recovery should be allowed upon proper proof.'

What, then, stands in the way of a reversal here? Surely as an original proposition, we would, today, be hard put to it to find a sound reason for the old rule. Following Drobner v. Peters (supra) would call for an affirmance but the chief basis for that holding (lack of precedent) no longer exists. And it is not a very strong reason, anyhow, in a case like this. Of course, rules of law on which men rely in their business dealings should not be changed in the middle of the game, but what has that to do with bringing to justice a tort-feasor who surely has no moral or other right to rely on a decision of the New York Court of Appeals? Negligence law is common law, and the common law has been molded and changed and brought up-to-date in many another case. Our court said, long ago, that it had not only the right, but the duty to re-examine a question where justice demands it (Rumsey v. New York & N. E. R. R. Co., 133 N. Y. 79, 85, 86, and see Klein v. Maravelas, 219 N. Y. 383.) That opinion notes that Chancellor Kent, more than a century ago, had stated that upwards of a thousand cases could then be pointed out in the English and American reports 'which had been overruled, doubted or limited in their application', and that the great Chancellor had declared that decisions which seem contrary to reason 'ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.' And Justice Sutherland, writing for the Supreme Court in Funk v. United States (290 U. S. 371, 382), said that while legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the court to bring the law into accordance with present day standards of wis-

dom and justice rather than 'with some outworn and antiquated rule of the past'. No reason appears why there should not be the same approach when traditional common-law rules of negligence result in injustice (see Hagopian v. Samuelson, 236 App. Div. 491, 492, and see Justice Stone's article on 'The Common Law in the United States', 50 Harv. L. Rev. (1936), pp. 4-7).

The sum of the argument against plaintiff here is that there is no New York decision in which such a claim has been enforced. Winfield's answer to that (see U. of Toronto L. J. article, supra, p. 29) will serve: 'if that were a valid objection, the common law would now be what it was in the Plantagenet period.' And we can borrow from our British friends another not: 'When these ghosts of the past stand in the path of justice clanking their mediæval chains the proper course for the judge is to pass through them 'undeterred' (Lord Atkin in United Australia, Ltd. v. Barclay's Bank, Ltd. (1941), A. C. 1, 29). We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice.

The same answer goes to the argument that the change we here propose should come from the Legislature, not the courts. Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." (pp. 354, 355).

Petitioner respectfully submits that the abatement rule of the common law has no place in the Maritime setting, either as a proposition of law or as a matter of social policy. As such—the Court may now (as set forth by Mr. Justice Sutherland in *Funk* v. *United States*, 290 U. S. 371) declare and effectuate a present rule in the light of fundamentally altered conditions. Petitioner prays that this Court will now declare an interment of the common-law "death maxim" as it may apply to the facts of the present case.

POINT II

Under the Wrongful Death Statute of West Virginia, maritime and not local principles of law were applicable with respect to the issues of assumption of risk and the duties of the litigants.

Assuming *arguendo*, that the general maritime law does not afford a remedy, "'where death—results from a maritime tort, committed on navigable waters within a state whose statutes give a right of action for wrongful death, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given.' *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 242." *Tungus* v. *Skovgaard*, 358 U. S. 588, 591.

The District Court's finding of fact of Carbide's negligence was predicated upon Carbide's knowledge of the conditions prevailing aboard the vessel at the time it was brought in for repair, that it knew that the operation carried on by the deceased and others would involve many men working on the barge, that under the circumstances it had the duty to provide reasonably suitable rescue equipment on the barge in order to furnish the workmen with a safe place to work, that the absence of such safety equipment was the proximate cause of Goett's death.

Concedely, the West Virginia Wrongful Death Statute permitted a right of action grounded upon Carbide's negligence. This Court in the *Skovgaard* case on page 594, considered the question as settled. In *Holley* v. *S.S. Manfred*, #7822, decided July 9, 1959 (not reported to date), the Court of Appeals for the Fourth Circuit upheld the right to bring suit for tortious conduct under the Wrongful Death Statute of Virginia, which had language similar to that of the West Virginia Statute.

The Court of Appeals held that Carbide's duty was only to warn Goett of a "hidden danger or latent

defect",[5] that delivery of the barge to Amherst negated Carbide's duty to provide a safe place to work, which duty then transferred over to Amherst.

Thus, the destruction of liability was grounded upon the application of the discarded doctrine of duty only to warn, associated with the principle of assumption of risk as a complete bar to recovery (the duty to provide reasonably safe conditions did not extend to patent defects which a workman would know of and would therefore assume—to his complete detriment).

The duty of a shipowner to provide employees of contractors with a safe place to work has been laid down time and time again as a governing principle of maritime law. *Holley* v. *S.S. Manfred, supra*; *Skovgaard* v. *Tungus*, 252 F. 2d 14, affirmed by the Supreme Court, 358 U. S. 588; *Puleo* v. *H. E. Moss*, 159 F. 2d 842 (6th Cir.); *Grillo* v. *Royal*, 139 F. 2d 237 (2d Cir.); *Militano* v. *United States*, 156 F. 2d 599 (2d Cir.); which is not discharged by any concurrent duty upon the worker's employer. *McFall* v. *Belge*, 304 N. Y. 314; *Fodera* v. *Booth*, 159 F. 2d 795 (2d Cir.); *Anderson* v. *Laurentzen*, 160 F. 2d 173 (2d Cir.); *Feinman* v. *Bull*, 211 F. 2d 293 (3rd Cir.).

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[5] No law was cited in support of the principle.

[6] In *Holly* v. *S.S. Manfred*,—F. 2d —, the Fourth Circuit clearly set forth its belief that the reason for the existence of the state Wrongful Death Statute was to destroy the immunity of the wrongdoer under the common law. The statute did not predicate liability upon application of local as distinguished from maritime law, but simply on whether there would have been a recovery, had the decedent only been injured. Thus—the duty owed to GOETT by CARBIDE was grounded upon maritime principles and not the local state law.

Byrd v. *Napoleon*, 125 F. Supp. 573, affirmed 227 F. 2d 958 (5th Cir.), stated that the general principles of negligence law under the general maritime law and Louisiana State law were the same. *Allen* v. *Matson*, 255 F. 2d 273 (9th Cir.) held that the duty resting upon the parties was the same whether under maritime law or state law, apparently accepted by this Court in *Romero* v. *International*, 358 U. S. 354, at p. 376, footnote 44.

In *Halecki v. United*, 251 F. 2d 708, opinion by Honorable Learned Hand, as affirmed by this Court, 358 U. S. 613, the duty of the shipowner to ascertain that the methods and manner of the operation was safe for those engaged throughout the entire operation was affirmed.

> "The deceased was certainly an 'invited person,' or 'business guest,' and the shipowner was liable, not only for the negligence of the master, but although the work was let out to a subcontractor, also for any lack of 'reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities.' Being charged with knowledge that so dangerous a substance as tetrachloride might be used, it was proper to leave to the jury whether the 'methods and manner' of its use were proper" (p. 711).

And in this Court:

> "As to the claim based upon negligence, for which the New Jersey Wrongful Death Act clearly gives the right of action, we agree with the Court of Appeals that 'the evidence created an issue that could be decided only by a verdict.' The defendants owed a duty of exercising reasonable care for the safety of the decedent. They were charged with knowledge that carbon tetrachloride was to be used in the confined spaces of the engine room. It was for the triers of fact to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner of its use" (pp. 618-619).

The opinion of the District Court in the case at bar was entirely consistent with the *Halecki* rulings by the Court of Appeals and by this Court.

The Court below held that the shipowner could not be charged with the duty to overseer the safety of workers, even when aware of the prevailing conditions, and dis-

missed that obligation by holding that the delivery of the vessel discharged the owners from any further responsibility. The District Court's finding of fact charging Carbide with knowledge was thus reversed, though clearly not erroneous and supported by evidence that Carbide was well aware of the lack of safety rescue equipment, that it inspected the vessel after its delivery, for the purpose of discussing and pointing out the work to be done.

As such, the ruling of the Court below should be reversed as conflicting with the decision of this Court in *McAllister* v. *United States*, 348 U. S. 19, which laid down the "clearly erroneous" doctrine of the Federal Rules as being applicable in an Admiralty suit.

Carbide, having such knowledge and owing the duty to provide Goett with a safe place to work, was the common law doctrine of assumption of risk as a complete bar, or the doctrine of comparative negligence in its Maritime setting, applicable?

In *Holley* v. *S/S Manfred* (4th Cir.), the Court held that the Wrongful Death Statute of Virginia, having language similar to that of West Virginia (if death had not ensued)[7] would permit the maritime doctrine of law to govern as the only consistent construction in view of

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[7] Code of Virginia. "Article 3. Death by Wrongful Act. Sec. 8-633. Action for death by wrongful act.—Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony. * * *"

the fact that the maritime worker would have had that right if only injured. In so holding, the Court cited and quoted the *Halecki* decision with approval.[8]

The doctrine of assumption of risk, as such, has been uniformly rejected by the Admiralty jurisdiction. *Panama* v. *Johnson*, 289 F. 964, affirmed 264 U. S. 375; *Sanford* v. *Caswell*, 200 F. 2d 830; *Becker* v. *Waterman*, 179 F. 2d 713; *Armit* v. *Loveland*, 115 F. 2d 308; *Seeandbee*, 102 F. 2d 577; *Pittsburgh* v. *Palo*, 64 F. 2d 198; *The Calvert*, 51 F. 2d 494; *New Berne*, 80 F. 2d 244, extended to maritime workers, *Palermo* v. *Luckenbach*, 355 U. S. 20; *Imperial* v. *Drlik*, 234 F. 2d 4.

The sole factual question is whether Goett had a free choice of safe or unsafe tools or method of performing his duty and voluntarily chose the unsafe tool or method. Under such a test, Goett could not be guilty of comparative negligence, since he was the unfortunate victim of a total lack of any safety equipment, without choice, voluntary or otherwise.

The fact that Goett may have known of the condition and continued working should not mitigate damages. In the *New Berne*, 80 F. 2d 244 (4th Cir.), the Court below thoroughly discussed the argument that continuation of employment was an assumption of risk:

> "To say that the servant assumes the risk of the master's negligent failure to provide him safe and suitable appliances with which to work, because he

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[8] The West Virginia Courts have approved and followed the construction placed on the Virginia statute, similar to its own. *Kelley* v. *Railroad*, 58 W. Va. 216; *Yeater* v. *Jennings*, 75 W. Va. 346. See also: *Woodell* v. *West*, 38 W. Va. 23, for a further discussion that the doctrine of assumption of risk in wrongful death actions follows the legal remedy available in injury cases.

The West Virginia Wrongful Death Statute has been termed "remedial" to be given a liberal construction "which rights a very ancient and very cruel wrong". *Rybold* v. *Jarrett*, 112 F. 2d 642 (4th Cir.).

> does not exercise the theoretical freedom of choice to leave the employment, is little short of mockery of the economic necessity which requires him to work with any appliances which may be provided. Instead of adopting the common law rule in admiralty, the rule of admiralty should be adopted by the common law, so that one whose negligent failure to provide safe appliances has resulted in injury to an employee should not be allowed to escape liability on the plea that the employee voluntarily assumed the risk of such negligence" (p. 248).

As such, there was no basis for the reversal of the District Court's finding of total absence of contributory negligence and assumption of risk, under the substantive law of the West Virginia Wrongful Death Statute.

The District Court having found that Carbide, having knowledge of the condition prevailing and the manner and method of the operation, in failing to provide Goett with rescue equipment, in failing to provide him with a safe place in which to work unqualified by any defense of assumption of risk or contributory negligence, was negligent, the determination of the Trial Court should have been maintained.

POINT III

The Wrongful Death Statute of West Virginia provided a remedy for breach of the warranty of seaworthiness.

The right of a state to modify or supplement the maritime law was confirmed in *Western v. Garcia*, 257 U. S. 233, at page 241, limited however, by the inability of the state to change the general features of the maritime law so as to defeat uniformity.

This Court has repeatedly declared that locale of the accident (the high seas or navigable waters within state territory) establishes Admiralty jurisdiction.

Claims affecting maritime workers and questions of scope of their rights and liabilities were within the Admiralty jurisdiction and were not of local concern, *Robins* v. *Dahl*, 266 U. S. 449; *Gonsalves* v. *Morse*, 266 U. S. 171; *Baizley* v. *Span*, 281 U. S. 222; *The Jefferson*, 215 U. S. 130; *Great Lakes* v. *Kierejewski*, 261 U. S. 479. In *Atlantic* v. *Imbrovek*, 234 U. S. 52 and *Atlantic* v. *Szczesek*, 234 U. S. 63, companion cases arising out of the same maritime tort, one for personal injuries, the other for wrongful death pursuant to the state statutory remedy, the identic character of both actions was affirmed.

City of Norwalk, 55 F. 98 (discussed with approval by this Court in *Just* v. *Chambers*, 312 U. S. 383) discussed the Wrongful Death Statute of New York and stated that the cause of action was still the creation of the maritime law, that the state statute gave rise only to a right of action, but that the case was no less maritime in its essential.

> "'The state statute does not create the *cause* of action. It does, indeed, create a new *right* and liability; but it does not create a single one of the elements that make up the fundamental cause of action, that is, the essential grounds of the demand. All these elements exist independently of the statute, and are not in the least affected by it. It no more creates the wrong, or the damage, than it creates the negligence or the death; nor does it, as in the pilotage and double wharfage cases add anything to the damages sustained. It authorizes no recovery except for 'the pecuniary damages' already existing. It is apparent, therefore, that, as suggested by Mr. Justice Clifford in *Steamboat Co.* v. *Chase*, 16 Wall. 532, the statute does no more than 'take the case out of the operation of the common-law maxim that an action for death dies with the person.'
>
> The affect of the statute is to attach a new legal right and responsibility to a purely maritime transaction. But that does not make the case in its essential nature any the less a *maritime* case. Nor does

> the enforcement of the statute extend the jurisdiction of the court, any more than the giving of damages for the first time for injuries to a cargo of dynamite or petroleum would be an extension of jurisdiction because those articles were new to commerce." (p. 109).

As stated in *Skovgaard* on page 592, the Admiralty jurisdiction adopts the "State's right of action" for wrongful death, enforcing the right "as an integrated whole, with whatever conditions and limitations the creating State has attached." However, while state law may at time supplement or modify the general maritime law, it cannot contravene the purpose of, work material prejudice to, or interfere with, the essential characteristics and harmony and uniformity of said law in its international and interstate relationships. *Romero* v. *International*, 358 U. S. 354, at page 373; *Just* v. *Chambers*, 312 U. S. 383; *Roanoke*, 189 U. S. 185; *Washington* v. *Dawson*, 264 U. S. 219; *Spencer* v. *Hicks*, 285 U. S. 502; *Union* v. *Erickson*, 248 U. S. 308; *DiSanto* v. *Pennsylvania*, 273 U. S. 34. See also: *Jansson* v. *Swedish*, 185 F. 2d 212; *Rogers* v. *City*, 285 F. 362; *Kuhn* v. *City*, 274 N. Y. 118; *Riley* v. *Agwilines*, 296 N. Y. 402; *McFall* v. *Belge*, 304 N. Y. 314.

The District Court, holding Carbide negligent, further found the vessel to be unseaworthy by reason of the absence of rescue equipment. Finding Carbide liable with fault, the Court declared that the doctrine of liability without fault was unnecessary to the result of the case.[9] The Court of Appeals did not determine whether the West Virginia Statute permitted an action for unseaworthiness since it reversed the Trial Court's findings and held the vessel seaworthy and further held that Goett

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[9] The Court held the doctrine of liability without fault inapplicable, apparently with the thought that if fault was established, proof of liability without fault was immaterial. As such the District Court seemingly confused the terminology, "liability irrespective of fault" with "liability without fault."

did not come within the class of workers entitled to the benefits of the doctrine.

The Court of Appeals in *Holley* v. *S.S. Manfred, supra*, implied approval of the Court of Appeals ruling in *Skorgaard* v. *Tungus*, 252 F. 14, affirmed by this Court, 358 U. S. 588, that the phrase "wrongful act, neglect or default" in a state Wrongful Death Statute permitted an action to lie for breach of the warranty of seaworthiness. As such following the procedure set forth by this Court in the *Skorgaard* decision, it would appear settled that the West Virginia Wrongful Death Statute, following the Virginia Statute, did permit an action for the breach of Carbide's duty to provide safety rescue equipment.

POINT IV

The shipowner, with knowledge that workers were to come aboard its vessel, breached its warranty of seaworthiness by failing to provide safety rescue equipment on the ship upon its delivery to the independent contractor for the work to be thereafter performed.

The Trial Court's finding of fact that the vessel was unseaworthy was predicated upon the admitted absence of any rescue equipment aboard the vessel. Carbide's duty was to provide Goett, a business invitee, with a seaworthy vessel, *Halecki* v. *United*, 251 F. 2d 708, as affirmed by this Court, 358 U. S. 613 on p. 617, the duty being non-delegable and absolute. *Osceola*, 189 U. S. 158; *Mahnich* v. *Southern* 321 U. S. 96; *Seas* v. *Sieracki*, 328 U. S. 85, and *Pope & Talbot* v. *Hawn*, 346 U. S. 406, extended by this Court in *Alaska* v. *Petterson*, 347 U. S. 396, and *Rogers* v. *United States*, 347 U. S. 984, to periods subsequent to delivery of the vessel to an independent contractor for work in furtherance of the shipowner's business.

The reason advanced by the Court of Appeals for its decision was that no rescue equipment was required on

the vessel, unmanned during transit, hence the absence of what wasn't necessary during one operation could not make the vessel unseaworthy when it was necessary during another.

Rogers v. *United States*, 347 U. S. 984, established liability to a shipowner for equipment brought aboard the vessel by the independent contractor without the knowledge of the shipowner and without the latter even knowing of the equipment's existence. In *Poignant* v. *United States*, 225 F. 2d 595 (2d Cir.), the Court held that the duty to provide a seaworthy vessel continued for all periods and not only at the commencement of the voyage.

The case of *Pope & Talbot* v. *Hawn*, 346 U. S. 406, affirmed *Sieracki*, *supra*, in holding that the doctrine of seaworthiness applied to a carpenter doing repair work aboard defendant's vessel:

> "Sieracki's legal protection was not based on the name 'stevedore' *but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness.* The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the *stevedores* then working with him on the ship *or of seamen* who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law" (pp. 412-413).

In the case of *Alaska* v. *Petterson*, 205 F. 2d 478, aff'd 347 U. S. 396, the Supreme Court affirmed its ruling in the *Sieracki* and *Hawn* cases, *supra*.

Petterson, a longshoreman, was injured while working aboard ship by an unseaworthy block, brought aboard by his employer, the stevedoring company. The decision of

the United States Court of Appeals, 205 F. 2d 478, affirmed by the Supreme Court, distinguished the doctrines of seaworthiness and negligence in stating that seaworthiness was a "specie of strict liability regardless of fault." The Court declared (p. 479):

> "If the block was being put to a proper use in a proper manner, as found by the district judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy.
>
> In making this inference we do not rely upon the tort doctrine of res ipsa loquitur, although the result is similar. Res ipsa loquitur is a doctrine of causation usually applied in cases of negligence. Here we are dealing with a specie of strict liability regardless of fault. Seas Shipping Co. v. Sieracki, supra, 328 U. S. at page 94, 66 S. Ct. 872. It is not necessary to show, as it is in negligence cases, that the shipowner had complete control of the instrumentality causing the injury, see O'Mara v. Pennsylvania R. Co., 6 Cir., 95 F. 2d 762; or that the result would not have occurred, unless someone were negligent, see Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365. It is only necessary to show that the condition upon which the absolute liability is determined — unseaworthiness — exists. Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561. That has been shown here."

Further discussing the interpretation placed upon the *Sieracki* decision regarding the "relinquishment of control" doctrine, the Court concluded that said doctrine, based upon an incorrect premise, was incorrect and unacceptable.

> "Judge Hand was correct in his interpretation of the Sieracki case as assimilating a longshoreman to the position of a seaman insofar as injuries received while on board ship are concerned. This is shown by the reference in the Sieracki opinion to the 'common core of policy which has been controlling' which is found running through the deci-

> sions permitting longshoreman to recover from shipowners 'that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, *regardless of the fact that he is employed immediately by another than the owner*' • • •. It cannot be assumed that the Court meant that the stevedore should lose this protection merely because his immediate employer had temporarily assumed control of a portion of the ship without becoming the owner *pro hac vice*.
>
> The liability of the shipowner to the seaman for injuries resulting from unseaworthiness does not depend upon negligence. It is absolute • • •. That this absolute duty is also owed to stevedores is clearly shown by the Sieracki case. See also Kulukundis v. Strand, 9 Cir., 202 F. 2d 708, 710. The analysis of the relinquishment of control doctrine above made shows that its major premise is that the liability of the shipowner to the stevedore is based upon negligence. We have shown that major premise to be incorrect; thus the entire doctrine is incorrect, and it should not be applied here'' (p. 480).

Petitioner submits that this Court, by its determinations in the *Hawn*, *Petterson and Rogers* cases, *supra*, has fully answered the question that existed with respect to liability as dependent upon "control" of the vessel at the time of accident.

The principles of law as laid down by the Supreme Court can lead to but one conclusion in the case at bar—that the question of seaworthiness of the vessel, an issue of fact, cannot be determined on the basis of "control".

Thus, the non-delegable, absolute duty of Carbide under the doctrine of seaworthiness, upon principles of the general maritime law, continuing although the vessel was moored and under the supervision of Amherst, existed at the time of the decedent's death.

In *Lester* v. *United States*, 234 F. 2d 625, the Court of Appeals for the Second Circuit relied upon the cases of

Alaska v. *Petterson*; *Pope & Talbot* v. *Hawn* and *Seas* v. *Sieracki*, *supra*, for the proposition that the doctrine of seaworthiness was extended to shore based harbor workers who were injured while working aboard a vessel, moored or in drydock.

Ross v. *S. S. Zygland*, 240 F. 2d 820 (4 Cir.), involved a claim for personal injury by a night watchman when he tripped on a wire. In affirming a decree for the libelant, the Court below held:

> "A vessel and her owner are liable to indemnify a seaman for an injury caused by the unseaworthiness of the vessel or a failure to supply and keep in order the proper appliances appurtenant to the ship. The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760; Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561. This obligation of the shipowner has been extended to benefit longshoremen and carpenters who are injured in the course of their employment while aboard the ship, even thought they were employed by independent contractors. Seas Shipping Co., Inc. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099; Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143. The owner's absolute duty to provide a seaworthy vessel, with appurtenant appliances and equipment, is not affected by relinquishment of control to another. Alaska Steamship Co., Inc. v. Petterson, 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798, affirming Petterson v. Alaska S. S. Co., 9 Cir. 205 F. 2d 478; Rogers v. United States Lines, 347 U. S. 984, 74 S. Ct. 849, 98 L. Ed. 1120, reversing Rogers v. United States Lines, 3 Cir. 205 F. 2d 57. Those cases hold that the owner is liable for defects in equipment brought aboard by a stevedore and used under the stevedore's sole control. The doctrine of seaworthiness has also been extended to include improper stowage of cargo, causing personal injuries. Palazzolo v. Pan-Atlantic S.S. Corp., 2 Cir. 211 F. 2d 277, 279; The State of Maryland, 4 Cir. 85 F. 2d 944, 947, and cases cited. Cf. Berti v. Compagnie De Nav. Cyprien Fabre, 2 Cir. 213 F. 2d 397" (p. 822).

* * *

"The crucial consideration is whether the ship was, in all respects pertinent to the injury, reasonably fit to permit libellant to perform his task aboard the ship with reasonable safety. Lester v. U. S., 2 Cir. 234 F. 2d 625, 628" (p. 822).

See also: *Hunt* v. *United States*, 17 F. Supp. 578, aff'd 91 F. 2d 1014; *Hawn* v. *American*, 107 F. 2d 999; *Carumbo* v. *Cape*, 123 F. 2d 991; *The Falco*, 20 F. 2d 362; *Weaver* v. *Pittsburgh*, 153 F. 2d 597; *United States v. Lindgren*, 28 F. 2d 725 (4th Cir.), aff'd 281 U. S. 38.

Carbide delivered the vessel to Amherst for the maintenance and repair work, knowing the working conditions which would prevail aboard her. The shipowner could not escape the duty placed upon it by the simple expedient of delegating work to others. *Seas* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot* v. *Hawn*, 346 U. S. 406; *United* v. *Halecki*, 358 U. S. 613. The fact of change of condition aboard the vessel could not negate Carbide's duty.[10]

POINT V

The shipowner's warranty of seaworthiness encompassed employees of an independent contractor after delivery of the vessel for its periodic painting and minor repairs, work traditionally performed by seamen.

Petitioner respectfuly submits that Carbide's duty to provide a seaworthy vessel was no less in force than it was when the vessel was in transit, provided that Goett

[10] *Lester* v. *United States*, 234 F. 2d 625, cited by the Court below in support of its ruling involved nothing more than a factual holding by the Court of Appeals that the Trial Court was incorrect in finding that a repair contract calling for replacement of a railing *per se* rendered the vessel unseaworthy if an accident occurred involving the absence of the railing. The appellate court expressly ruled that the doctrine of seaworthiness was applicable during the repair period. As such, the *Lester* case is diametrically opposite to the ruling of the Court of Appeals in the case at bar.

came within the class of workers performing work traditionally done by seamen.

Goett was entitled to the protection of the doctrine of seaworthiness if he was performing "work traditionally done by members of the crew." *United* v. *Halecki*, 358 U. S. 613.[11]

The work to be done on the vessel, set forth in the contract between Carbide and Amherst, consisted of sandblasting and painting the vessel and "minor repairs" (Pet. Ex. 12, p. 207). The minor repair was the replacement of butterworth hatches.[12] The entire contract price was $4,712.60, of which 24 hatches at $55.88 per hatch amounted to $1,341.12.

Goett was sandblasting the deck of the vessel at the time of his fall, an operation performed to prepare the deck for painting, the modern industrial way to take the paint down to the metal.

The seaman has, from time immemorial, painted his ship; he has traditionally and continues today to chip and scrape paint from the ship's surface preparatory to painting his vessel.

Evidence of the traditional duties of crewmen to paint, chip and scrape the vessel and its component parts is readily available in the various agreements between the seamen's unions for unlicensed personnel and shipowners throughout the nation. See: Working agreement of the National Maritime Union of America, dated June 16, 1956 on pp. 34, 63, 83, 84, 86, 87, 89, 95, 106; agreement of the

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[11] This appears to be the very question posed by the *amicus curiae* brief of the United States in the *Halecki* case, not reached by the Court. See footnote 7, at p. 618.

[12] Small openings leading to the internal self cleaning system of the vessel.

Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association at pp. 43-47.

The situation herein is not factually consistent with that of the *Halecki* case. As the Court pointed out, Halecki was doing work of the specialist subcontractor, who was brought aboard the ship specifically to clean the ship's generator which were being dismantled and overhauled. The Court pointed out that crewmen had to leave the ship during use of the carbon tetrachloride in the operation. Of course, that was not the case herein since there was an entire gang aboard the ship doing other necessary preparation for the painting operation and who were to remain on the ship to complete the contract.

Further, the work in *Halecki* necessitated that the entire ship be "dead" for the cleaning operation which Halecki was performing, an operation foreign to "what any crew member had ever done on this ship or on anywhere else in the world * * *" (p. 618).

The absence of a crew during transit periods necessitated the delivery of the vessel to Amherst for the work, not the unique nature or the degree of knowledge involved in the work. As such, Goett, doing what seamen could and would customarily do was entitled to the same protection from the hazards involved, the protection of safety rescue equipment. *Sadler* v. *Pennsylvania*, 159 F. 2d 784 (4th Cir.); affirmed by the Court below in the case at bar (R. 249).

Petitioner submits that the right of a cause of action for unseaworthiness was afforded by the West Virginia Wrongful Death Statute, that the vessel was unseaworthy by reason of absence of safety rescue equipment at the time of Goett's death (unqualified by the delivery of the vessel to Amherst) and that Goett was within the class of workers doing the traditional duties of seamen to whom flowed the protection of the warranty of seaworthiness.

Petitioner submits that Carbide was and is legally responsible for the breach of that duty.

POINT VI

In this action for wrongful death of a maritime worker arising out of a maritime tort and predicated upon the general maritime law as supplemented by the Wrongful Death Statute of West Virginia, the State statutory maximum monetary limitation was unenforceable as being contrary to the essential characteristics of the general maritime law and against its public policy of uniformity in its international and interstate relations.

The rights and liabilities of litigants arising out of a maritime tort ordinarily depends upon the acceptance and application of the State Statute by the Admiralty Courts, which are controlling, wherever suit may have been instituted. *Western* v. *Garcia, supra,* at page 241. The Admiralty *forum* must adopt the State Statute in every respect qualified only by its right as the *forum* to refuse to enforce statutory enactment against the policy of the Admiralty jurisdiction in its effort to insure proper harmony and uniformity in its international and interstate relations. *Lottawanna,* 88 U. S. 558; *Workman* v. *New York,* 179 U. S. 552; *Knickerbocker* v. *Stewart,* 253 U. S. 149.

As stated in *Romero* v. *International,* 358 U. S. 354, "State law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system" (p. 373).[13]

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[13] Seemingly not dissimilar to the right of a *forum* to refuse to enforce a statute of the *lex loci* contrary to the public policy of the *forum.*

"In such a case as this it is incumbent upon the Admiralty to enforce the . . . (*lex loci*) . . . statute 'just as it would one originating in any foreign jurisdiction.' *Levinson* v. *Deupree,* 345 U. S. 648, 651." *Tungus* v. *Skovgaard, supra,* at page 595.

Restatement on Conflicts of Law, § 612, pages 731-732:

"§ 612. Action Contrary to Public Policy.

No action can be maintained upon a cause of action created in another state the enforcement of which is con-

The District Court ruled that the $20,000.00 maximum monetary limitation of the West Virginia statute was applicable in actions of this nature.

The Court of Appeals did not specifically rule upon the issue since it was unnecessary to its holding.[14]

Query: Does the monetary limitation set forth in the West Virginia Statutes, §5475(6), contravene the policy of the maritime law.

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trary to the strong public policy of the forum.
Comment:

a. Distinction between policy denying access to courts and policy refusing to apply foreign rule of law. The rule stated in this Section is applicable when the entire basis of the claim upon which suit is brought is so contrary to the public policy of the forum that it will withhold altogether the use of its courts to enforce the claim. A distinction is to be noted between such a policy and the policy which, while it does not require denial of access to the courts of the forum, nevertheless requires the courts to apply certain local rules in the course of the litigation to enforce the local notions concerning the manner and method in which the courts of that state should function. This latter policy may be called the procedural policy of the forum. This procedural policy differs from the policy which denies access to the local courts under the rule stated in this Section in the following respect: in the former case, the legal relations between the parties as determined by the foreign law will be enforced subject to certain limitations imposed by local rules; in the latter situation the state refuses altogether to enforce the legal relations created by the foreign law."

Poling v. *Poling*, 116 W. Va. 187 (1935), held that rights created or recognized by the *lex loci* must give way when in conflict with law or public policy of the *lex fori*, that the public policy of the later meant "the law of the state, whether found in the constitution, statutes, or judicial records" (p. 192).

See also: *McKnett* v. *St. Louis*, 292 U. S. 230; *Loucks* v. *Standard*, 224 N. Y. 99; *Herzog* v. *Stern*, 264 N. Y. 379; *Weissengoff* v. *Davis*, 260 F. 16 (4th Cir.); *The Titanic*, 233 U. S. 718, at pp. 732-733; *Black Diamond* v. *Steward*, 336 U. S. 386.

[14] The Court below stated generally that the substantive law of the state involved must be accepted and cited *Quinette* v. *Bisso*, 136 F.

Workman v. *New York*, 179 U. S. 552, a libel by the shipowner resulting from a collision between his vessel, moored at a City dock, and a City owned fireboat, involved a sovereign, exempt from suit except by statutory permission and which, by municipal law, limited liability. This Court upheld the doctrine that the general maritime law, as a constitutional grant of power, controlled the issue of monetary limitation; that to permit local law to limit recovery would be destructive of the essential characteristics and uniformity and harmony of the Admiralty jurisdiction, which would result in the "practical destruction of a uniform maritime law".

> "The practical destruction of a uniform maritime law which must arise from this premise, is made manifest when it is considered that if it be true that the principals of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts, can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one State and one in another; one thing in one

---

825, as controlling the issue of limitation of damages. *Quinette* was nothing more than a statement that the Court favored looking to the recoveries granted by the State Courts under similar facts and circumstances in the assessment of damages. The case did not concern a monetary limitation under a Wrongful Death Statute since the sum awarded was only $4,000.00.

If this Court determines that the "death maxim" was applicable, that Goett's sole remedy was pursuant to the Wrongful Death Statute of West Virginia, but that the statutory maximum recovery section of the Act was inapplicable, petitioner submits that the cause should then be remanded to the District Court for further findings of damages only.

The West Virginia Statute permitted recovery for loss of future support and for mental anguish of the widow. It did not permit recovery for pain and suffering of the decedent prior to death or for nurture. As such, the District Court finding of damages for Goett's pain and suffering and nurture would be stricken and a further finding of damages made for the mental anguish of Goett's widow.

Port of the United States and a different thing in some other Port. As the power to change state laws or state decisions rests with state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusion to result would amount to the abrogation of uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed, would besides apply to other subjects specially confided by the Constitution to the Federal Government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright and commerce clauses of the Constitution, it would result that a municipal corporation, in the exercise of administrative powers which the state law determines to be governmental, could with impunity violate the patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels." (p. 558). * * *

In doing so, it becomes manifest that the decisions of this court overthrow the assumption that the local law or decisions of a State can deprive of all rights to relief, in a case where redress is afforded by the maritime law and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States." (p. 560).

The *Thielbek*, 241 F. 209, was an appeal in an admiralty suit by shipowners against each other and against the City of Portland, which arose out of a collision. The decree was in favor of one shipowner against the other and the city. The latter was engaged in pilotage and towage service under legislative enactment which had in its charter a limitation of liability of $10,000.00. The decree was for a sum greater than the limitation.

The Court, in affirming, held that local law or statutes could not abrogate or limit the amount of damages recoverable under the maritime law in a suit properly before an Admiralty Court.

See also: *Southern* v. *Jensen*, 244 U. S. 205, and *Knickerbocker* v. *Stewart*, *supra*, in which this Court affirmed the view that the state could not, by legislation, grant a compensation remedy to maritime workers in derogation of their maritime rights to damages; and *Moore-McCormack* v. *Amirault*, 202 F. 893; *Newburgh* v. *Texas*, 227 F. 2d 732, and *New Zealand* v. *Earnmoor*, 79 F. 368, in which the question of interest as a part of the recovery of damages was held to be controlled by maritime principles rather than by state legislation.

While the cases cited do not concern themselves with wrongful death statutes, the rule of law would seem to be in point, that a suit existing by virtue of statutory permission, and having a monetary limitation may not enforce the limitation as being contrary to the avowed policy of the Admiralty jurisdiction to insure harmony and uniformity in the essential characteristics of the maritime law.

Petitioner respectfully submits that the monetary limitation under the West Virginia legislation was unacceptable and unenforceable in this suit for wrongful death arising out of a maritime tort.

CONCLUSION

Petitioner respectfully prays that this honorable Court will reverse the ruling of the Court below and remand this matter to said Court for further proceedings in accordance with the facts and law above set forth.

Respectfully submitted,

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No. 3

IN THE

Supreme Court of The United States

OCTOBER TERM, 1959

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased,

Petitioner,

v.

UNION CARBIDE CORPORATION and AMHERST BARGE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT—UNION CARBIDE CORPORATION

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No. 3

IN THE

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OCTOBER TERM, 1959

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased,

Petitioner,

v.

UNION CARBIDE CORPORATION and AMHERST BARGE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT—UNION CARBIDE CORPORATION

JURISDICTION AND OPINION BELOW

Petitioner's brief sets forth correctly the jurisdiction of this court and that the opinion of the United States Court of Appeals for the Fourth Circuit (R241-250) is reported at 256 F. 2d 449. The unreported decision of the District Court appears in the printed record beginning at page 194.

QUESTIONS PRESENTED

1. The Court of Appeals was correct in holding that the general maritime law does not allow recovery for wrongful death.

2. The Court of Appeals was correct in holding that while "(i)n 1920 Congress adopted an act to provide a remedy for wrongful death on the high seas, 46 U. S. C. A. § 761 et seq. . . . there is no similar act where the death occurs on inland waters, unless the claim is against the employer of a deceased seaman and therefore covered by the Jones Act, 46 U. S. C. A. § 688."

3. The Court of Appeals was correct in holding that " 'where death . . . follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given.' "

4. The Court of Appeals was correct in holding that "(t)he West Virginia Wrongful Death Act, like other statutes patterned on Lord Campbell's Act, has created a new cause of action for the benefit of certain named beneficiaries, and has not perpetuated the cause of action which the deceased had before his death."

5. The Court of Appeals was correct in holding that admiralty courts in entertaining a libel in personam for damages for death from a wrongful act occurring on the inland navigable waters of the United States

must follow the substantive law of the state whose wrongful death statutes supply the cause of action.

6. When, as in this case, a libel in personam in an admiralty proceeding bases its cause of action upon the West Virginia Wrongful Death Act and alleges negligence as the cause of death and relies upon the warranty of seaworthiness, an admiralty court, in its obligation to apply the substantive law of the State of West Virginia, must follow the West Virginia law as to (A) the duty which a property owner owes to an employee of an independent contractor employed by the owner to make repairs to his property; (B) the proximate cause of death; (C) assumption of risk and/or contributory negligence; (D) limitation on damages recoverable in an action for wrongful death; (E) the manner of assessing damages under the West Virginia Wrongful death Act; and (F) whether a breach of the warranty of seaworthiness, a maritime principle, resulting in death, gives rise to a cause of action under the West Virginia Wrongful Death Act.

7. The Court of Appeals and the District Court were correct in holding that the warranty of seaworthiness did not extend to the decedent, a shorebound employee of an independent contractor engaged in sandblasting a non-self-propelled and unmanned barge which had been withdrawn from navigation and delivered into the sole custody and control of Amherst, the independent contractor, for repairs requiring drydocking.

8. Assuming that the warranty of seaworthiness extended to the decedent, the Court of Appeals was cor-

rect in holding that the barge CC-204 was not unseaworthy.

9. For any damages the petitioner may recover from Carbide in this case, Carbide is entitled to be indemnified by Amherst under the express terms of contracts between Carbide and Amherst, and by reason of Amherst's breach of its implied contractual duty to do the work contracted for in a safe and workmanlike manner.

STATUTES INVOLVED

West Virginia Constitution, Art. III, Sect. 13

"In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; * * *"

WEST VIRGINIA STATUTES

"§ 5474: (5) Action for Wrongful Death—Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree or manslaughter. No action, however, shall be maintained by the personal representative of one who, not an infant, after injury, has compromised for such injury and accepted satisfaction therefor previous to his

death. Any right of action which may hereafter accrue by reason of such injury done to the person of another shall survive the death of the wrongdoer, and may be enforced against the executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death, whether or not the death of the wrongdoer occurred before or after the death of the injured party."

"§ 5475. (6) Party Plaintiff in Such action; Damages; Distribution; Limitation.—Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate, left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars; Provided, however, if the plaintiff in such action shall prove by a preponderance of the evidence financial or pecuniary loss sustained by a distributee or distributees of such deceased person in an amount exceeding the sum of ten thousand dollars the jury may give such damages as shall equal such financial or pecuniary loss, not exceeding twenty thousand dollars as the total of all damages recoverable in such action, and the amount so recovered shall not be subject to any debts or liabilities of the deceased. Every such action shall be commenced within two years after the death of such deceased person."

COAST GUARD STATUTES AND REGULATIONS

14 U. S. C. A., § 633.

"In addition to the authority conferred by other provisions of this title the Secretary may promulgate

such regulations and orders as he deems appropriate to carry out the provisions of this title or any other law applicable to the Coast Guard. Aug. 4, 1949, c. 393, § 1, 63 Stat. 545."

The following sections from "Rules and Regulations, United States Coast Guard," February 1, 1954, and Revisions to October 1, 1956, (Title 46 C. F. R., 30 to 39 inclusive).

"31.15-5—Tank barges—B/ALL. Tank barges need not be manned unless in the judgment of the Officer in Charge, Marine Inspection, such manning is necessary for the protection of life and property and for the safe operation of the vessel."

"32.01-10 Rails —TB/ALL. (a) All tank vessels, except unmanned tank barges, the construction or conversion of which is started on or after July 1, 1951, shall be fitted with fixed or portable rails on decks and bridges."

"33.40-5 (now 33.40-10) Number required on tank barges — B/ALL. All tank barges regardless of size shall have at least two life buoys on board: Provided, however, That unmanned barges are exempt from this section."

"34.40-5 Hand fire extinguishers for quarters, pump room, and machinery spaces — B ALL. (d) Each unmanned tank barge not provided with a cargo pump room shall be equipped with at least one 2½ gallon foam type fire extinguisher or the equivalent, which may be carried aboard the barge or the towing vessel, while under way. When the barge is moored to the dock, such equipment shall be accessible, or equivalent equipment may be supplied by the terminal."

STATEMENT

This appellant accepts the statement of the case quoted from the opinion of the Court below but not the insertions or bracketed matter. In addition to the portions of the opinion of the Court below quoted by appellant we deem the following pertinent:

"It is not necessary for us to decide whether a suit in admiralty under the West Virginia Act can ever be based upon unseaworthiness, because Goett was not a person to whom the warranty of seaworthiness ran, and because we do not agree with the finding of the district judge that the barge was unseaworthy." (RP-247)

"The work order called for drydocking of the vessel; without such drydocking the bottom and sides of the barge would have been inaccessible. The warranty of seaworthiness does not apply in that situation.

"The barge was not unseaworthy. In its ordinary operations, it was unmanned, and did not require life saving equipment. It did not become unseaworthy when men went aboard after it had been turned over to a repair yard under the circumstances of this case. *Lester* v. *United States*, 2 Cir., 234 F. 2d 625, cert. den. 352 U. S. 889.

"B. Nor was Carbide negligent in delivering the barge to Amherst without mounting life rings or other safety equipment on the barge, or in failing to rescue Goett after he fell into the river, as contended by his administratrix. There is of course, a duty on a vessel and her owners to have life saving equipment available to rescue members of her crew who fall overboard while the vessel is in operation. *Sadler* v. *Pennsylvania*, 4 Cir., 159 F. 2d 784, and cases cited. A similar duty

is owed to business visitors who come aboard while the vessel is in the custody and control of her officers or other representative of the owners. But in the instant case Carbide had delivered the barge into the sole custody and control of Amherst. Carbide's duty under those circumstances was to warn Amherst and its employees of any hidden danger or latent defect. There was no hidden danger (fol. 613) or latent defect in the barge. It was the duty of Amherst to supply its employees with a reasonably safe place in which to work. It knew and controlled the conditions of the work and the equipment which would be used. It was Amherst's responsibility to decide whether a temporary railing or stanchions should be errected, whether its men should be required to wear preservers, and whether and where life rings and other rescue equipment should be mounted." (RP-249-250)

SUMMARY OF ARGUMENT

This is a law action transferred to admiralty by administratrix of shore bound employee of contractor against barge owner for alleged wrongful death. Such employee met his death by drowning in the Kanawha River, having fallen or jumped from flat deck of unmanned tank barge moored along contractor's dry-dock, the barge being in the sole custody and control of contractor.

The general maritime law does not allow recovery for wrongful death and petitioner's claim is predicated on the wrongful death statute of West Virginia. This is a new cause of action. Points I, II, III and IV. The Court of Appeals was correct in holding that admiralty courts, in entertaining such an action, must follow the substantive law of the state supplying such cause and "must enforce the right as an integrated whole, with

whatever conditions and limitations the creating State has attached." Point V.

The conditions and limitations of the West Virginia statute include (a) definition of the duty which a property owner owes to the employee of an independent contractor making repairs (there was no breach of duty and no negligence shown); (b) definition of proximate cause of death; (c) defenses of assumption of risk and/or contributory negligence; (d) a limitation on the amount of damages recoverable in such action; (e) the manner of assessing damages under the statute on which the cause or action is predicated; (f) whether a breach of the warranty of seaworthiness gives rise to the cause under the state statute. Point VI.

Both courts below were correct in holding that the warranty of seaworthiness does not extend to a shore bound employee of an independent drydocking contractor engaged in making repairs to an unmanned barge, withdrawn from navigation and in the sole custody and control of contractor. Point VII. But the barge was not unseaworthy and the Court of Appeals was correct in so finding. Point VIII.

Carbide, the owner, is entitled to indemnification from Amherst, the independent contractor, if any recovery is allowed against owner. Point IX.

ARGUMENT

I.

The Court of Appeals was correct in holding that the general maritime law does not allow recovery for wrongful death.[1]

On no less than three occasions within the past two years, this Court has held expressly or in effect that

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[1] *General Maritime Law*—The Harrisburg, 119 U. S. 199, 7 S. Ct. 140, 30 L. Ed. 358 (1886); Metcalf v. The Alaska, 130 U. S. 201, 9 S. Ct. 473, 32 L. Ed. 923 (1889); Butler v. Boston & Savannah Steamship Co., 130 U. S. 527, 9 S. Ct. 612, 32 L. Ed. 1017 (1889); Barton v. Brown, 145 U. S. 335, 12 S. Ct. 949, 36 L. Ed. 727 (1892); The Albert Dumois, 177 U. S. 240, 20 S. Ct. 595, 44 L. Ed. 751 (1900); Deslions v. La Compagnie Generale Transatlantique, 210 U. S. 95, 28 St. Ct. 664, 52 L. Ed. 973 (1908); Western Fuel v. Garcia, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210 (1921); Panama R. Co. v. Rock, 266 U. S. 209, 45 S. Ct. 58, 69 L. Ed. 250 (1924) (dictum); Lindgren v. United States, 281 U. S. 38, 50 S. Ct. 207, 74 L. Ed. 686 (1930); Just v. Chambers, 312 U. S. 383, 61 S. Ct. 687, 85 L. Ed. 903 (1941) (dictum); Levinson v. Deupree, 345 U. S. 648; 73 S. Ct. 914, 97 L. Ed. 1319 (1953); Kernan v. American Dredging Co., 355 U. S. 426, 78 S. Ct. 394, 2 L. Ed. 2d 382 (1958); Romero v. International Term. Operat. Co., 358 U. S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368, 383 (1959) (dictum); The Tungus v. Skovgaard, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524 (1959); United N. Y. & N. J. S. H. Pilots Asso. v. Halecki, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959); O'Leary v. United States Lines Co., 215 F. 2d 708 (1st Cir. 1954), cert. den., 348 U. S. 939, 75 S. Ct. 360; 99 L. Ed. 735 (1955); Turner v. Wilson Line of Mass., 242 F. 2d 414 (1st Cir. 1957); Halecki v. United New York & New Jersey S. H. P. Ass'n., 251 F. 2d 708 (2d Cir. 1958), case remanded on another point in 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959); Curtis v. A. Garcia Y Cia, 241 F. 2d 30 (3d Cir. 1957); Skovgaard v. The M/V Tungus, 252 F. 2d 14 (3d Cir. 1957), affirmed, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 527 (1959); Pope v. McCrady Rodgers Co., 164 F. 2d 591 (3d Cir. 1947); Holley v. The Manfred Stansfield, 269 F. 2d 317 (4th Cir. 1959); Mejia v. U. S., 152 F. 2d 686 (5th Cir. 1946), cert. den., 328 U. S. 862, 66 S. Ct. 1366, 90 L. Ed. 1632 (1946); Niepert v. Cleveland Electric Illuminating Co., 241 F. 2d 916 (6th Cir. 1957), cert. den., 354 U. S. 909, 77 S. Ct. 1295, 1 L. Ed. 2d 1427 (1957); Loc-Wood Boat & Motors v. Rockwell, 245 F. 2d 306 (8th Cir. 1957).

it is an established principle of maritime law that in the absence of a statute there is no action for wrongful death. *Skovgaard*, *Halecki*, and *Kernan*, footnote 1. First established over sixty years ago in the carefully considered case of *The Harrisburg*, this principle has over the years been considered and recognized in case after case handed down by this Court, prompting Mr. Justice Brennan in his dissent to *Skovgaard* to observe that it "has become part and parcel of our maritime jurisdiction." Also, within recent times, indeed within a little over the past decade, at least seven of the federal judicial circuits have rendered decisions based upon this principle, reference being made to the repeated holdings of the Supreme Court; see the cases in footnote 1.

Thus, we do not have here a principle which was established long ago and not re-evaluated in modern times, but rather a principle where the opportunity for review has been frequent, especially in recent years. This constant reappraisal by this Court and the federal Courts of Appeal demonstrates the consideration given the matter and the deep roots the principle has in maritime law.

Petitioner in her brief apparently takes the position that the general maritime law provided an action for wrongful death in the absence of statute and that *The Harrisburg* in holding the contrary is in error. While no authority is cited in support of this proposition, petitioner hints that some ancient continental maritime law permitted such a cause of action which became fused into the Roman Codes. "Concededly," the petitioner asserts the civil law provided a remedy

in an action for wrongful death. Petitioner's Brief at p. 19. Apparently the French courts have recognized in maritime cases a cause of action for wrongful death, but as noted in *Deslions* v. *La Compagnie Generale Transatlantique*, 210, U. S. 95, 28 S. Ct. 664, 52 L. Ed. 973, 993 (1908), such right of action has been recognized and enforced only from the date of the enactment of the Code Napoleon. Even the article of the Napoleonic Code therein relied upon was not recognized as conferring a right of action for wrongful death under the law of Spain, a more express statute being necessary.

But even assuming that there existed some ancient continental maritime law granting a cause of action in such cases, the United States is not compelled to follow it, nor can an inconvenient controlling precedent be brushed off merely by an historical demonstration (which has not been made here) that the precedent was based upon a misunderstanding of earlier decisions. *Mitchell* v. *Trawler Racer, Inc.*, 265 F. 2d 426, 432 (1st Cir. 1959).

In *The Lottawanna*, 21 Wall. 558, 572, 22 L. Ed. 654, 661, Mr. Justice Bradley, speaking for the Court, said:

"(I)t is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country . . ."

And in *United States* v. *Thompson (The Western Maid)*, 257 U. S. 419, 432, 42 S. Ct. 159, 66 L. Ed. 299, 302, Mr. Justice Holmes, speaking for the Court, said:

> "(W)e must realize that, however ancient may be the traditions of maritime law, however di-

> verse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over law to which even the United States must bow."

There is also the famous dissent of Mr. Justice Holmes in *Southern P. Co.* v. *Jensen*, 244 U. S. 205, 61 L. Ed. 1086, 1100 (1917), in which he recognized that there is no superior source of maritime law from that declared by the United States and that "(t)he maritime law is not a corpus juris—it is a very limited body of customs and ordinances of the sea."

Thus, the precedent set in *The Harrisburg* is doubly guarded, in that while the petitioner goes to great length to discuss a conflict between the common law and admiralty courts in England centuries ago, she has failed to historically demonstrate that this decision was based upon any misunderstanding of earlier law, and even assuming that it was, the United States was not then and is not now bound by any contrary ancient continental maritime decisions, if there be such.

II.

The Court of Appeals was correct in holding that while "(i)n 1920 Congress adopted an act to provide a remedy for wrongful death on the high seas, 46 U. S. C. A. § 761 et seq. . . . there is no similar act where the death occurs on inland waters, unless the claim is against the employer of a deceased seaman and therefore covered by the Jones Act, 46 U. S. C. A. § 688."[2]

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[2]The Tungus v. Skovgaard, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524 (1959); Levinson v. Deupree, 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953).

Goett was not a seaman, respondent Carbide was not his employer, and his death occured upon the territorial waters of West Virginia; therefore, neither the Death on the High Seas Act nor the Jones Act is applicable.

III.

The Court of Appeals was correct in holding that " 'where death . . . follows from a maritime tort committed on navigable waters within a state whose statutes gives a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given.' "[3]

IV.

The Court of Appeals was correct in holding that "(t)he West Virginia Wrongful Death Act,[4] like other statutes patterned on Lord Campbell's Act, has created a new cause of action for the benefit of certain named beneficiaries, and has not perpetuated the cause of action which the deceased had before his death."[5]

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[3]The Tungus v. Skovgaard, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524 (1959); Levinson v. Deupree, 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953); Western Fuel v. Garcia, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210 (1921).

[4]Chapter 55, Article 7, Section 5 et seq., of the Official Code of West Virginia, 1931, as amended.

[5]A. *English Courts*—Pym v. Great Northern Ry., 4 B&S 396, 122 Eng. Rep. 508 (Exch. 1863); see 31 Tulane L. Rev. 353 (1957).

B. *Federal Courts*—Gulf, C&S, F. T. Co. v McGinnis, 228 U. S. 173, 33 S. Ct. 426, 57 L. Ed. 785 (1913); American R. Co. v. Didricksen, 227 U. S. 145, 33 S. Ct. 224, 57 L. Ed. 456 (1913); Thames v. State of Mississippi, 117 F. 2d 949 (5th Cir. 1941); Curtis v. A. Garcia Y Cia, 241 F. 2d 30 (3d Cir. 1957); 16 Am. Jur., Death, § 61, p. 48; Crab Orchard Improvement Co. v. Chesa-

V.

The Court of Appeals was correct in holding that admiralty courts in entertaining a libel in personam for damages for death from a wrongful act occurring on the inland navigable waters of the United States must follow the substantive law of the state whose wrongful death statutes supply the cause of action.[6]

The Court in the *Skovgaard* case, decided earlier this year, said in considering this problem,

> "The decisions of this court long ago established that when admiralty adopts a State's right of action for wrongful death, it must enforce the

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peake & Ohio Ry. Co., 33 F. Supp. 580 (S. D. W. Va., 1940); affirmed, 115 F. 2d 277 (4th Cir. 1940).

C. *West Virginia Supreme Court of Appeals*—Burgess v. Gilchrist, 123 W. Va. 727, 17 S. E. 2d 804 (1941); Dunsmore v. Hartman, 140 W. Va. 357, 84 S. E. 2d 137 (1954).

D. *State Courts generally*—See cases listed in 16 Am. Jur., Death, § 61, p. 48.

[6]The Tungus v. Skovgaard, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524 (1959); Levinson v. Deupree, 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953); Western Fuel v. Garcia, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210 (1921); Garrett v. Moore-McCormack Co., Inc., 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942); See also the Courts of Appeal cases at footnote 8 in The Tungus v. Skovgaard, *supra*, to which may be added Niepert v. Cleveland Electric Illuminating Co., 241 F. 2d 916 (6th Cir. 1957), cert. den., 354 U. S. 909, 77 S. Ct. 1295, 1 L. Ed. 2d 1427 (1957); Hartford Accident & Indemnity Co. v. Gulf Refining Co., 230 F. 2d 346 (5th Cir. 1956), cert. den., 352 U. S. 832, 77 S. Ct. 49, 1 L. Ed. 2d 52 (1956); Continental Casualty Co. v. Thorden Line, 186 F. 2d 992 (4th Cir. 1951); Puleo v. H. E. Moss & Co., 159 F. 2d 842 (2d Cir. 1947), cert. den., 331 U. S. 847, 67 S. Ct. 1733, 91 L. Ed. 1857 (1947); Byrd v. Napoleon Avenue Ferry Co., 125 F. Supp. 573 (E. D. La., 1954), affirmed in a memorandum decision, 227 F. 2d 958 (5th Cir. 1955), cert. den., 351 U. S. 925, 76 S. Ct. 783, 100 L. Ed. 1455 (1956). See also Student Comments 68 Harv. L. Rev. 1266 (1955), and 41 Va. L. Rev. 251 (1955), and Student Note 31 Tulane L. Rev. 353 (1957).

right as an integrated whole, with whatever conditions and limitations the creating State has attached. That is what was decided in The Harrisburg, where the Court's language was unmistakable.

". . . (I)f the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence . . . The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.' 119 U.S. 199, at 214. That is the doctrine which has been reiterated by the Court through the years. See the Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 US 398, 52 L. ed. 264, 28 S. Ct. 133; The La Bourgogne (Deslious v. La Compagnie Generale Transatlantique) 210 US 95, 52 L ed 973, 28 S Ct 664; Western Fuel Co. v. Garcia, 257 US 233, 66 L ed 210, 42 S Ct. 89; Levinson v. Deupree, 345 US 648, 97 L ed 1319, 73 S Ct 914; cf Just v. Chambers, 312 US 383, 85 L ed 903, 61 S Ct. 687.

"'Admiralty courts when invoked to protect rights rooted in state law endeavor to determine the issues in accordance with the substantive law of the state.' Garrett v. Moore-McCormack Co. 317 US 239, 245, 87 L ed 239, 243, 63 S Ct. 246. The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose."

* * * * *

"There is no merit to the contention that application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law. Even Southern P. Co. v. Jensen, which fathered the uniformity concept, recognized that uniformity is not offended by the right given to recover in death cases. 244 US 205, at 216. It would be an anomaly to hold that a State may create a right of action for death, but that it may not determine the circumstances under which that right exists. The power of a State to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not. Cf. Caldarola v. Eckert, 332 US 155, 91 L ed 1968, 67 S Ct 1569.

"We hold, therefore, that the Court of Appeals was correct in viewing the basic question before it as one of interpretation of the law of New Jersey. It is within that frame of reference that we consider the issues presented."

VI.

When, as in this case, a libel in personam in an admiralty proceeding bases its cause of action upon the West Virginia Wrongful Death Act and alleges negligence as the cause of death and relies upon the warranty of seaworthiness, an admiralty court, in its obligation to apply the substantive law of the State of West Virginia, must follow the West Virginia law as to (A) the duty which a property owner owes to an employee of an independent contractor employed by the owner to make repairs to his property;[7] (B) the

[7]The Tungus v. Skovgaard, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524 (1959). See Mr. Justice Brennen dissent to Skovgaard at page 539 of Lawyers' Edition wherein he states, "Although it

proximate cause of death;[8] (C) assumption of risk and/or contributory negligence;[9] (D) limitation on damages recoverable in an action for wrongful death;[10]

(opinion of the Court) believes that the Court of Appeals properly applied New Jersey law, the Court accepts the contention (made by the petitioner) that state law applied here." Puleo v. H. E. Moss & Co., 159 F. 2d 842 (2d Cir. 1947), cert. den., 331 U. S. 847, 67 S. Ct. 1733, 91 L. Ed. 1857 (1947); The H. S. Inc., No. 72, 130 F. 2d 341 (3d Cir. 1942); Lundberg v. Prudential Steamship Corp., 102 F. Supp. 115, 118 (1951). The derivation of the duty pronounced in United N. Y. & N. J. S. H. Pilots Asso. v. Halecki, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541, 545 (1959) is not revealed, although the Court of Appeals cited the Restatement of Torts, Vol. II, § 344, Comment B; footnote 3 in Halecki, 251 F. 2d 708, 711. The duty announced in Kermarec v. Transatlantique, 358 U. S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550, 555 (1959), is to be distinguished in that the case involved personal injuries and the court applied maritime law principles; see also Young v. Masci, 289 U. S. 253, 53 S. Ct. 599, 77 L. Ed. 1158 (1933); Gulf, Mobile & Ohio R. Co. v. Freund, 183 F. 2d 1005 (8th Cir. 1950), cert. den., 340 U. S. 904, 71 S. Ct. 280, 95 L. Ed. 654; Hartford Accident & Indem. Co. v. Eastern Air Lines, 155 F. Supp. 263 (S. D. N. Y., 1957); Clise v. Prunty, 108 W. Va. 635, 152 S. E. 201 (1930); 13 A. L. R. 2d 650, 11 Am. Jur., Conflict of Laws, § 182, p. 490.

[8]Whether a breach of a duty was the proximate cause of death is to be determined by the substantive law of the State and its definition of proximate cause. This follows from the principle stated in Point Five.

[9]Curtis v. A. Garcia Y Cia, 241 F. 2d 30 (3d Cir. 1957); Niepert v. Cleveland Electric Illuminating Co., 241 F. 2d 916 (6th Cir. 1957), cert. den., 354 U. S. 909, 77 S. Ct. 1295, 1 L. Ed. 2d 1427 (1957); Hartford Accident & Indemnity Co. v. Gulf Refining Co., 230 F. 2d 346 (5th Cir. 1956), cert. den., 352 U. S. 832, 77 S. Ct. 49, 1 L. Ed. 2d 52 (1956); Graham v. A. Lusi, Limited, 206 F. 2d 223 (5th Cir. 1953); Klingseisen v. Costanzo Transp. Co., 101 F. 2d 902 (3d Cir. 1939); Feige v. Hurley, 89 F. 2d 575 (6th Cir. 1937); Byrd v. Napoleon Avenue Ferry Co., 125 F. Supp. 573 (E. D. La., 1954), affirmed in a memorandum decision, 227 F. 2d 958 (5th Cir. 1955), cert. den., 351 U. S. 925, 76 S. Ct. 783, 100 L. Ed. 1455 (1956).

[10]The Tungus v. Skovgaard, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524, 528 (1959), wherein it was said, "The decisions of this court long ago established that when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the

(E) the manner of assessing damages under the West Virginia Wrongful Death Act;[11] and (F) whether a breach of the warranty of seaworthiness, a maritime principle, resulting in death, gives rise to a cause of action under the West Virginia Wrongful Death Act.[12]

A: The Court of Appeals was correct in holding that there was no affirmative duty on the part of Carbide to change the conditions of its unmanned barge, the CC-204, by mounting life rings or other safety equipment thereon, to make ready for the work of the decedent and other employees of Amherst Barge Company, and was correct in holding that since Carbide had delivered the barge into the sole custody and control of Amherst, Carbide's sole duty, with respect to the negligence count, was to warn Amherst and its employees of any

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creating State has attached." The West Virginia Wrongful Death Act expressly limits the damages recoverable in such action: ". . . the jury may give such damages . . . not exceeding twenty thousand dollars as the total of all damages recoverable in such action . . .". Code Serial Section 5475 (6); see also Hupp Motor Car Corp. v. Wadsworth, 113 F. 2d 827 (6th Cir. 1940); Barnes v. Union Pacific Railroad Co., 139 F. Supp. 198 (D. Idaho, 1956); 11 Am. Jur., Conflict of Laws, § 185.

[11]Reference is made to The Tungus v. Skovgaard, *supra*, footnote 10, and in particular to its direction that admiralty must enforce a state's wrongful death act "with whatever conditions and limitations the creating State has attached." The West Virginia Wrongful Death Act expressly provides that "the jury may give such damages" as authorized. Code Serial Section 5475 (6). In Legg v. Jones, 126 W. Va. 757, 30 S. E. 2d 76 (1944), the court said, "In actions (for wrongful death), it is the peculiar right, as well as the duty, of the jury to fix the amount of the recovery. The right is conferred and the duty imposed by the statute which gives the right of action . . . The authority of the jury to determine the amount of recovery in such cases is absolute . . ."

[12]The Tungus v. Skovgaard, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524 (1959); Levinson v. Deupree, 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953).

hidden danger or latent defect, of which there was none.[13]

The Court of Appeals in its statement of the facts well describes the CC-204, the tank barge owned by Carbide, and the repairs which Amherst was required to make by its contract with Carbide; accordingly, since this statement is for the most part accepted by petitioner (Brief, pp. 4 and 5), it will be quoted at some length:

> "Carbide was the owner of the CC-204, an unmanned steel tank barge, with a flat deck. Except for pipe lines, it had no superstructure of any kind, but there were keyels along the outer edges of the deck to assist in mooring. It had no railing around its deck and was not equipped with any life rings or similar rescue equipment. Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys, and it is not customary for such barges to be so equipped. The barge and its equipment had been inspected, certified and approved by the Coast Guard; the certificate of inspection issued on April 1, 1955, granted permission for navigation as an unmanned tank barge on rivers and inland waters tributary to the Gulf of Mexico, approved for use without equipment other than fire extinguishers.
>
> "Amherst owns and operates a repair dock, with marine ways on the Kanawha River, at Reed, West Virginia. In October, 1955, Carbide contracted with Amherst for a biennial drydocking, certain welding repairs and improvements to the barge, including installation of twenty-

[13] Sesler v. Coal Co., 51 W. Va. 318, 41 S. E. 216 (1902); Trimyer v. Norfolk Tallow Co., 192 Va. 776, 66 S. E. 2d 441 (1951); 38 Am. Jur., Negligence, § 97, p. 757. Roberts v. Axe & Tool Co., 107 W. Va. 236, 148 S. E. 70 (1929), distinguished.

four Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides with perparation for the painting by means of sandblasting. The work was to be done in accordance with Carbide's written specification. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications.

"In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 2. Carbide's supervisor of barge maintenance went on board the barge on the following day with Amherst's maintenance superintendent, to point out and discuss the work that was to be done.

"No officer, crewman, watchman or other person employed by Carbide was left on or with the barge after it was delivered to Amherst; it was in the exclusive care, custody and control of Amherst on October 5, when Goett was drowned. The barge was then afloat on the Kanawha River, lying along shore, near Amherst's marine ways; it was moored to and against the head of a digger boat, which lay downstream from the barge. The digger boat was attached to the shore by a semi-permanent ramp, which was the means of access to the barge from the shore. A ring-type life buoy with a line attached was mounted on the digger boat."

It is to be emphasized that the CC-204 was an unmanned barge; that applicable Coast Guard Regulations (14 U. S. C. A. § 88; R. 242) did not require the CC-204 to be equiped with railings or life buoys; and that a certificate of inspection issued by the Coast

Guard on April 1, 1955, granted permission for navigation of the CC-204 as an unmanned tank barge on rivers and inland waters tributary to the Gulf of Mexico without equipment other than fire extinguishers. (R. 217, 242) The attempt by unidentified pictures in a book by an unidentified author to show that inland tank barges carried life saving equipment not only failed (R 188) but if admissible actually showed the contrary and petitioners alleged expert finally admitted (R 124) that it is not customary to so equip such barges.

Yet, in face of this, the District Court concluded that Carbide was duty bound to install or erect life lines, stanchions, and other rescue equipment on the barge before placing it in the exclusive care, custody and control of Amherst, a competent and experienced marine repair contractor. Place this duty in another context. If a homeowner calls in a roofing contractor to repair his roof, he has the duty, according to the conclusions of the District Court, to furnish the contractor's employees with safety devices such as safety ladders, ropes, scaffolding, etc., to protect the employees of the contractor against the very dangers that arise from their work. Negligence is a conclusion of law which Courts of Appeal will review. *Verbeck* v. *Black Diamond Steamship Corp.*, 269 F. 2d 68.

The Court of Appeals accordingly held that the District Judge had imposed too strict a duty upon Carbide and concluded that *under the circumstances of the case* there was no duty on the part of Carbide to change the conditions of its unmanned barge, the CC-204, by mounting life rings or other safety equipment thereon (Equipment not required or used in navigation), to make ready for the work of the decedent and other em-

ployees of Amherst. "(I)n the instant case Carbide had delivered the barge into the sole custody and control of Amherst. Carbide's duty under those circumstances was to warn Amherst and its employees of any hidden danger or latent defect. It was the duty of Amherst to supply its employees with a reasonably safe place in which to work. It was Amherst's responsibility to decide whether a temporary railing or stanchions should be erected, whether its men should be required to wear preservers, and whether and where life rings and other rescue equipment should be mounted." (R. 249, 250; 256 F. 2d 449, 455)

As demonstrated *supra* in main Point VI, it is the West Virginia law which must be followed in measuring the duty which a property owner owes to an employee of an independent contractor employed by the owner to make repairs to his property. In *Sesler* v. *Coal Co.*, 51 W. Va. 318, 41 S. E. 216 (1902), an independent contractor in the second count of his declaration against his employer averred," 'It became and was the duty of the defendant to furnish for the plaintiff while he was so in its employ, a good, proper, safe and suitable place for him to work, so that he might be secure and safe in all respects from injury against which ordinary care and foresight could avail.' " On demurrer, the Court was faced with the question of "(w)hat duty by law is due from an employer (sic) to one who is an independent contractor to do a specific work?" The Court decided the issue by quoting from a note in 26 L. R. A. 524, which it believed correctly stated the law, as follows:

> " 'With few exceptions, the cases agree in holding that the premises upon which an independ-

ant contractor is required to labor for the benefit of the owner must be reasonably safe for the purposes of such labor, so far as freedom from concealed danger is concerned.' We may thus say, that if the decision of this case does in fact rest on any duty arising merely from the relation of the parties because of the contract between them, the unsafety of the premises must be such as was known, or by fair care could have been known to the defendant, and was unknown, and by fair care could not have been known to the contractor; for it is very clear that if the plaintiff knew, or by fair care could have known of the work which injured him, he cannot recover. Whart. on Negligence, s. 833. It is well established that if one knows, or by fair care could know of danger threatening him, he cannot encounter that danger, and charge his injury upon the owner of the primises even though that owner be in fault. Such would be even the law between master and servant."

There is the later case of *Roberts* v. *Axe and Tool Co.*, 107 W. Va. 236, 148 S. E. 70 (1929), wherein the Court stated:

"(a)n independent contractor at work on premises where his contract requires him to be is an invitee, and that while thus engaged he is entitled to the protection of ordinary care on the part of the owner or occupier of the premises, and . . . such invitee must be furnished a reasonably safe place in which to work."

The *circumstances of the case* in which this principle was announced must be understood, for the statement as applied to the facts of that case in no way imposes an affirmative duty upon the property owner of the nature described by the District Judge in the instant case. In

the *Roberts* case, the premise owner not only remained in control of its property on which the employee of the independent contractor was working, but continued actively engaged in manufacturing and owner's operations caused the injury. Under these circumstances, said the Court, the owner and his employees were required to exercise reasonable precaution for the safety of the erecting contractor's workmen.

In *Trimyer* v. *Norfolk Tallow Co.*, 192 Va. 776, 66 S. E. 2d 441 (1951), the Court had to decide upon the duty which a premise owner had to an employee of an independent contractor engaged to make repairs to his property, and held as follows:

> "The owner must give notice or warning to an invitee of an unsafe condition which is known to him and is unknown to the invitee; but notice or warning is not required where the dangerous condition is open and obvious to a person who is exercising reasonable care for his own safety. In the absence of knowledge or warning of danger, such an invitee is entitled to assume that the premises are reasonably safe for his visit.
>
> "The duty to warn, however, exists only with respect to latent dangers not to those which are or ought to be obvious to the invitee. To sustain a charge of negligence the unsafe condition relied on must be one of which the owner knew or should have known, and the invitee did not know and could not reasonably have discovered."

The Tungus v. *Skovgaard*, 358 U. S. 590, 79 S. Ct. 505, 3 L. Ed. 2d 524 (1959), is to be distinguished first because the Court applied New Jersey law as to duty (see Mr. Justice Brennan's dissent at pages 538 and 539 of 3 L. Ed. 2d), and second because the Court found that

"the officers and crew of the *Tungus* remained in overall control of the vessel, and that they were aware of the existence of the oil spill and of the danger created by it for approximately an hour before Skovgaard arrived on board. Under these facts," said the Court, "it was concluded that the law imposed upon the petitioner the duty of exercising ordinary care to provide Skovgaard with a reasonably safe place to carry on his work of repairing the pump," and this Court found no reason to question the disposition of this branch of the case.

United N. Y. & N. J. S. H. Pilots Asso. v. *Halecki*, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541 (1959), is to be distinguished first because the case did not arise under the West Virginia Wrongful Death Act, and second because the vessel owner had knowledge that the use of an inherently dangerous substance was to be employed in the narrow confines of the engine room.

In conclusion, it is submitted that the Court of Appeals was correct in holding that under the *circumstances of this case* Carbide's duty was "to warn Amherst and its employees of any hidden danger or latent defect. There was no hidden danger or latent defect in the barge," and hence no negligence.

We also submit that under any rule of duty that Carbide did furnish decedent a safe place to work and that there is no evidence to the contrary.

B. Even assuming (which is denied) that there was an affirmative duty on the part of Carbide to change the conditions of its unmanned barge, the CC-204, by mounting life rings or other safety equipment thereon, to make ready for the work of the decedent and other

employees of Amherst, any breach of this duty was not, under West Virginia law which here governs, the proximate cause of the death here complained of.[14]

If, indeed, Carbide was negligent in turning its barge over to Amherst without safety and rescue equipment, Amherst certainly knew that fact (R. 77, 138), and by failing to furnish its employee with this equipment was itself negligent in not providing its employees with a reasonably safe place in which to work (R. 249, 250). As was said in *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181, 182 (9th Cir. 1950),

> "With this knowledge (Amherst) should not have permitted (Goett) to work in this dangerous circumstance as to which it was fully informed, * * * 'Where one of the wrongdoers completes his wrong, and the subsequent damages are due to an independent act of negligence, which supervenes in time, and which has as its

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[14]Washington v. B & O Railroad Company, 17 W. Va. 190, 196 (1880); Accord, Tompkins v. Kanawha Board, 21 W. Va. 224, 231 (1882); Fawcett v. Railway Co., 24 W. Va. 755, 759 (1884); State v. Baller, 26 W. Va. 90, 105 (1885); Berns v. Coal Co., 27 W. Va. 285, 304 (1885); Douney v. Railway Co., 28 W. Va. 732, 737 (1886); Pegram v. Stortz, 31 W. Va. 220, 234, 6 S. E. 485 (1888); Phillips v. County Court, 31 W. Va. 477, 481, 7 S. E. 427 (1888); Harrow v. Ohio River R. Co., 38 W. Va. 711, 715, 18 S. E. 926 (1894); Poling v. Ohio R. R. Co., 38 W. Va. 645, 669, 18 S. E. 782 (1893); Carrico v. W. Va. C & P Ry. Co., 39 W. Va. 86, 98, 19 S. E. 571 (1894); Anderson v. Railroad Co., 74 W. Va. 17, 22, 81 S. E. 579 (1914); Keirn v. McLaughlin, 121 W. Va. 30, 33, 1 S. E. 2d 176 (1939); McKinney v. Miller, 138 W. Va. 324, 75 S. E. 2d 854 (1953); Matthews v. Cumberland & Allegheny Gas Co., 138 W. Va. 639, 77 S. E. 2d 180, 189 (1953); Hartley v. Crede, 140 W. Va. 133, 82 S. E. 2d 672 (1954). See also American President Lines v. Marine Terminals Corp., 234 F. 2d 753, 759 (9th Cir. 1956), cert. den., 352 U. S. 926, 77 S. Ct. 222, 1 L. Ed. 2d 161 (1956); United States v. Rothschild International Steve. Co. 183 F. 2d 181 (9th Cir. 1950).

basis a condition which has resulted from this first act of negligence, in that case they do not share; but in that case we say that the consequences of the first act of negligence did not include the consequences of the second."

The same principle was similarly stated in the recent West Virginia case of *Hartley* v. *Crede*, 140 W. Va. 133, 82 S. E. 2d 672 (1954), wherein the Court said;

> "The proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not have occurred* * * The proximate cause of an event is that cause which in actual sequence, unbroken by any independent cause, produces an event and without which the event would not have occurred.
>
> "An intervening cause of an injury is a negligent act or omission which constitutes a new effective cause and which, operating independently of anything else, is the proximate cause of the injury."

As earlier pointed out, it is the West Virginia law on proximate cause which governs. In the much older case of *Washington* v. *B & O Railroad Company*, 17 W. Va. 190, 196 (1880), the Court in discussing proximate cause said:

> "The act or omission which constitutes negligence, must be such as directly produces as its natural consequence an injury to another. And therefore if a party do an act, which might naturally produce an injury to another as its consequence, but before any such injury results, a third person does some act or omits to perform some act, which it was his duty to perform, and this act or omission of such third person is the immediate cause of an injury, which would not

> have occurred but for his negligence, such third person is responsible for such injury and not the party guilty of the first negligence; for the causal connection between the first act of negligence and the injury is broken by the interposition of the act or omission of the third party. And this act or omission of the third party is in law regarded as the cause of the injury, and the act of the first party is in law regarded as a mere condition, according to the maxim: 'In jure non remota causa sed proxima spectatur.'"

The act, then, of Carbide in turning its barge over to Amherst in its normal condition without safety and rescue equipment was not the proximate cause of decedent's death, but, rather, the proximate cause was the negligent omission on the part of Amherst to provide its own employees with a reasonably safe place in which to work. Thus, the District Court was clearly in error in finding Carbide negligent, for its omission, if any, was not the proximate cause of the decedent's death.

C. Assuming that there was an affirmative duty on the part of Carbide towards the decedent as described in the foregoing Point VI-B, there could not be a recovery in this case for any breach of the same, in that under West Virginia law, which here governs, assumption of risk and/or contributory negligence, however slight, on the part of the decedent bars recovery under the West Virginia Wrongful Death Act,[15] and the evidence in this case demonstrates as a matter of law that the decedent both assumed the risk and was contributorily

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[15]Woodell v. West Virginia Improvement Co., 38 W. Va. 23, 17 S. E. 386, 392 (1893); Barr v. Curry, 137 W. Va. 364, 71 S. E. 2d 313 (1952); Wolfe v. Beatty Motor Express, W. Va. , 101 S. E. 2d 81, 84 (1957); and numerous West Virginia cases cited in 13 M. J., Negligence § 26, p. 539.

negligent and accordingly the District Judge's negative findings in these respects were clearly erroneous.

As has previously been pointed out in main Point VI of this brief, it is the West Virginia law on contributory negligence and assumption of risk which governs in this case.

In a recent opinion of the West Virginia Supreme Court of Appeals, that Court again stated that West Virginia does not recognize the rule of comparative negligence. Thus, in *Wolfe* v. *Beatty Motor Express*, ... W. Va. ..., 101 S. E. 2d 81, 84 (1957), the Court said:

> "This court has not recognized the rule of comparative negligence. Therefore, we are not at liberty to determine whether the negligence of the defendants was greater or less than that of the plaintiff, if the latter was negligent. The plaintiff cannot prevail if he was negligent, and his contributory negligence contributed proximately to his injury, in whatever degree he may have been negligent."

And in *Barr* v. *Curry*, 137 W. Va. 364, 372, 71 S. E. 2d 313 (1952), it was said:

> "A person whose negligence proximately contributes to his injury cannot recover and if death ensues, a recovery cannot be had by his personal representative."

Accordingly, then, it is well settled in West Virginia that any contributory negligence on the part of the decedent, however slight, would bar his personal representative from recovering under West Virginia's Wrongful Death Act. See also the cases cited in footnote 15.

In *Curtis* v. *A. Garcia Y Cia*, 241 F. 2d 30 (3d Cir. 1957), the Court of Appeals for Third Circuit held that where a suit for wrongful death was instituted in admiralty based upon the Pennsylvania Wrongful Death Act, the Pennsylvania rule on contributory negligence governed and accordingly any contributory negligence on the part of the decedent barred recovery.

In the Sixth Circuit case of *Niepert* v. *Cleveland Electric Illuminating Company*, 241 F. 2d 916 (6th Cir. 1957) cert. den., 354 U.S. 909, 77 S. Ct. 1295, 1 L. Ed. 2d 1427 (1957), the Court held that the Ohio rule of contributory negligence "having become part of the Ohio substantive law with reference to wrongful death" governed in a case of a wrongful death action instituted in admiralty based upon the Ohio Wrongful Death Act.

In the Fifth Circuit case of *Hartford Accident & Indemnity Co.* v. *Gulf Refining Co.*, 230 F. 2d 346 (5th Cir. 1956), cert. den., 352 U. S. 832, 77 S. Ct. 49, 1 L. Ed. 2d 52 (1956), the Court held in actions brought in admiralty under Louisiana death statute, for deaths of barge company's employees in explosion, that the actions were subject to all defenses against such claims, including contributory negligence, available to a defendant in a suit at law.

In the Sixth Circuit case of *Feige* v. *Hurley*, 89 F. 2d 575 (6th Cir. 1937), the Court held that right of action in personam for death under Kentucky's wrongful death statutes is enforceable in admiralty according to principles of the common law of Kentucky, under which contributory negligence is complete bar to recovery.

See also the cases of *Klingseisen* v. *Costanzo Transp. Co.*, 101 F. 2d 902 (3d Cir. 1939), and *Byrd* v. *Napoleon Avenue Ferry Co.*, 125 F. Supp. 573 (E. D. La., 1954), affirmed in a memorandum decision, 227 F. 2d 958 (5th Cir. 1955), cert. den., 351 U. S. 925, 76 S. Ct. 783, 100 L. Ed. 1455 (1956).

Even in the recent case of *Holley* v. *The Manfred Stansfield*, 269 F. 2d 317 (4th Cir. 1959), the Court recognized that it was necessary to look to the State law as to the defenses available to the defendant in an admiralty suit based on the Virginia Wrongful Death Act. The Virginia Act, unlike most wrongful death acts, specifically covers, among other things, " 'wrongful acts or defaults of any ship or vessel' " and speaks of the right " 'to proceed *in rem* against the ship or vessel.' " There is no similar language in the West Virginia Act.

Returning to the defenses of assumption of risk and contributory negligence under West Virginia law, it has been made clear by the West Virginia decisions that the two defenses are not identical. In the recent case of *Matthews* v. *Gas Co.*, 138 W. Va. 639, 656, 77 S. E. 2d 180 (1953), the West Virginia Supreme Court of Appeals, quoting in part from the earlier case of *Wright* v. *Valan*, 130 W. Va. 466, 43 S. E. 2d 364 (1947), said:

> " '. . . The essence of contributory negligence is carelessness; of assumption of risk, venturiousness.' . . . Contributory negligence rests in tort; assumption of risk rests in contract or in the principle expressed by the maxim 'volenti non fit injuria' which, translated is that 'he who consents cannot receive an injury.' . . . Contributory negli-

gence implies the failure to exercise due care; assumption of risk involves a choice made more or less deliberately and negatives liability even though the plaintiff may have acted with due care. The doctrine of assumption of risk is not limited to the relation of master and servant or to other contractual relations with respect to situations in which a person voluntarily assumes what is sometimes characterized as an incurred risk incident to a known and appreciated danger...

"The doctrine of assumed or incurred risk is based upon the existence of a factual situation in which the act of the defendant alone creates the danger and causes the injury, and the plaintiff voluntarily exposes himself to the danger with full knowledge and appreciation of its existence. ... The doctrine has been stated in these words: 'A person, who brings about a condition or situation obviously dangerous to himself by voluntarily exposing himself to a hazard created by another, assumes the risk of injury so created and thereby relieves such other of legal responsibility for an injury resulting from such exposures.'"

The District Judge in his conclusions of law in this case said:

"As to the doctrine of assumption of risk, I conclude that under the circumstances of this case Goett did not assume the risk of the danger which caused his death. I think it is not necessary to decide whether he did or did not assume the risk of falling over the side of the boat. It was not the fall that caused his death. The cause of his death, as I have found in my findings of fact, was the failure of Union Carbide and Carbon Corporation to have available rescue equipment, and that is a risk which I conclude Goett did not assume." (R. 196, 197)

Respondent Carbide submits that the findings of the District Judge that decedent did not assume risk of purported danger from lack of safety and rescue equipment is clearly erroneous. Assumption of risk on the part of the decedent is obvious. See *Ross* v. *Steamship Zeeland*; 240 F. 2d 820 (4th Cir. 1957), discussed *infra*.

If there was duty on the part of Carbide to furnish safety and rescue equipment, and that it denies, then it is obvious that the deceased assumed the risk of any danger to his own safety and welfare which may have been present by reason of the absence of such equipment.

The decedent's death occurred on the afternoon of the second day that he had worked on this particular barge, the CC-204, owned by Carbide. (R. 51) While of course, we do not have the testimony of the decedent, it is evident that in that time he recognized, or should have recognized, the very obvious fact that there was no safety or rescue equipment on the deck of the barge. A fellow employee testified as follows (R 51.):

> "Q. You well knew the location of the barge and you knew what was on the barge and what was not on the barge for some time before Mr. Goett fell overboard, didn't you?
> "A. Yes, sir.
>
> "Q. You were entirely familiar, weren't you, with the barge and its design and its location?
> "A. Yes, sir."

In *Humphreys* v. *Newport News & M. V. Co.*, 33 W. Va. 135, 10 S. E. 39 (1889), it was said: "If a servant willfully encounters dangers which are known to him, or are notorious, the master is not responsible for injury occasioned thereby," or, as put by the West Virginia Court in the recent decision of *Matthews* v. *Cum-*

berland & Allegheny Gas Co., supra, "A person who brings about a condition or situation obviously dangerous to himself by voluntarily exposing himself to a hazard created by another, assumes the risk of injury so created and thereby relieves such other of legal responsibility for an injury resulting from such exposures," and as shown by the cases cited above, it is the West Virginia law that should be applied here with regard to assumption of risk and contributory negligence.

With respect to contributory negligence on the part of the decedent, the District Judge in his conclusions of law in this case said:

> "On the question of contributory negligence my conclusion is that Mr. Goett was not guilty of any negligence that contributed to his death. I, in explanation of that, conclude that it is the burden of the one alleging contributory negligence to prove that contributory negligence by a preponderance of the evidence."

The superintendent of maintenance for Amherst, Mr. Frederick P. Martin (R. 74, 75), testified with respect to the availability of life jackets to the decedent and his fellow employees, as follows:

> "Q. Mr. Martin, at the time of Mr. Goett's death did the Amherst Barge Company require men working on the barges to wear life jackets?
> A. It wasn't required, but we did stress safety in a man, if he was afraid, that he had those for his benefit. In other words, they were furnished.
>
> Q. State whether or not life jackets were available for anyone who wanted to use one.
> A. The life jackets were always available.

Q. Where were they available?
A. We had them on our steamboats, plus a sufficient number in the supply house, more than what employees we employed there in the operation.

Q. Do you know approximately how many were available in the supply house?
A. I would say in the neighborhood of ninety.

Q. State whether or not the supply house was kept open.
A. At all hours during the work time, yes, sir.

Q. Did the men have occasion to go there?
A. Several times a day.

Q. Do you know whether Mr. Goett had occassion to go there on the day of his accident?
A. Mr. Goett was there the morning of this accident because I was talking to him that morning.

Q. What would a man, an employee who worked on these barges, such as Mr. Goett, have to do in order to get a life jacket if he wanted one?
A. Ask is all.

Q. Where did he have to ask?
A. The Supply department. They also have equipment. I may add that. In other words, any tool, any equipment (fol. 423) they wanted they could always get any type of material that way they wanted." (R. 140, 141)

The facts here are similar to those in *Ross* v. *The Zeeland* supra, in which both the Court of Appeals for the Fourth Circuit and the District Court, 143 F. Supp. 656 (E. D. Va. 1956) held that "the contributory negligence on the part of libellant is obvious," and the lower Court further said, "His carelessness in the face of

known facts would seem to obviate the necessity of further discussion on this point.

In the *Ross* case, the libellant, a watchman, employed by an independent contractor, was directed late at night by the Chief Officer to enter the No. 1 hold of the vessel to search for lighted cigarettes and persons. The hold was dark and no flashlight was provided or requested. The libellant in the daylight hours and in the night when light was available had entered the No. 1 hold a number of times. On these occasions he had observed a pile of wire cable about four feet in height located in the vicinity of the forward ladder. On descending this ladder, late at night, in the dark, and without a flashlight, he tripped over the pile of wire and thereby was injured. Upon these facts, the District Court and the Court of Appeals held that "contributory negligence on the part of the libellant is obvious," and that conclusion apparently rested upon the fact that the libellant had not requested or obtained a flashlight.

Here decedent had not requested or obtained any safety equipment for his own protection.

The defense of contributory negligence is not pertinent, however, until primary negligence on the part of Carbide has been shown, and we do not believe that such has been shown in this case. Plaintiff must establish primary negligence before question of contributory negligence arises, and before there can be primary negligence some duty owing from the defendant to the plaintiff must have been violated.

In this connection it should be remembered that no primary negligence was shown, and if it is to be as-

sumed, that no attempt was made by the District Judge to apply the doctrine of comparative negligence.

D. Assuming that Ellen Goett, personal representative of the decedent, would be permitted to recover damages from Carbide for the death of Marvin Paul Goett, the maximum permissible recovery under the West Virginia Wrongful Death act is twenty thousand dollars.[16]

In *The Tungus* v. *Skovgaard*, supra this Court said:

> "... The decisions of this Court long ago established that when admiralty adopts a State's right for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached... That is the doctrine which has been reiterated by the Court through the years.
>
> "... The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable but that damages shall be recoverable when conduct of a particular kind results in death. *It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose.*" (Italics supplied.)

This is also a well-settled principle in Conflict of Laws, which principles are applicable in admiralty cases based on a state's wrongful death act according to *Levinson* v. *Deupree*, 345 U. S. 648, 73 S. Ct. 914,

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[16]Chapter 55, Article 7, Section 6, of the Official Code of West Virginia, 1931, as amended; Dunsmore v. Hartman, 140 W. Va. 357, 84 S. E. 2d 137 (1954).

97 L. Ed. 1319 (1953). In *Hupp Motor Car Corp.* v. *Wadsworth*, 113 F. 2d 827, 829 (6th Cir. 1940), the Court said:

> ". . . The measure of damages in an action for tort is determined by the law of the state where the tort was committed."

See also *Barnes* v. *Union Pac. R. R. Co.*, 139 F. Supp. 198 (D. Idaho, 1956), and 11 Am. Jur., Conflict of Laws, § 185.

The West Virginia Wrongful Death Act expressly limits the damages recoverable in such action:

> ". . . the jury may give such damages . . . not exceeding twenty thousand dollars as the total of all damages recoverable in such action." Code Serial Section 5475 (6).

In *Dunsmore* v. *Hartman*, 140 W. Va. 357, 361, 84 S. E. 2d 137 (1954), the Court said:

> "The plain language of the statute (referring to the West Virginia Wrongful Death Act), we think, limits the jurisdiction of the court in an action for recovery of damages for wrongful death, both as to the nature of the damages recoverable and as to the maximum amount of recovery."

Thus, irrespective of the extent of recovery which may have been permitted "if death had not ensued," recovery for wrongful death in West Virginia is expressly limited to twenty thousand dollars.

The cases of *Workman* v. *New York*, 179 U. S. 552, and *The Thielbek*, 241 F. 209, cited at pages 45 and

46 of the petitioner's brief, are distinguishable as they do not involve a cause of action arising under a state's wrongful death act.

E. Damages under the West Virginia Wrongful Act may be assessed only by a jury.[17]

As has been noted previously, the recent case of *The Tungus* v. *Skovgaard*, *supra*, reiterates the principle long ago well established that admiralty must enforce a state's wrongful death act "with whatever conditions and limitations the creating State has attached . . . It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose."

The West Virginia Wrongful Act provides that ". . . the jury may give such damages . . ." as authorized. In *Legg* v. *Jones*, 126 W. Va. 757, 30 S. E. 2d 76 (1944), the court said, "In actions (for wrongful death), it is the peculiar right, as well as the duty, of the jury to fix the amount of the recovery. The right is conferred and the duty imposed by the statute which gives the right of action . . . The authority of the jury to determine the amount of recovery in such cases is absolute."

Moreover, Art. III, Sec. 13 of the West Virginia Constitution provides that "In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; . . ." This constitutional right given to all litigants

[17]Chapter 55, Article 7, Section 6, of the Official Code of West Virginia, 1931, as amended; Legg v. Jones, 126 W. Va. 757, 30 S. E. 2d 76 (1944); see also 15 C. J. S. Conflict of Laws, § 4, p. 858.

in common law suits was made a part of the cause of action provided by the West Virginia legislature for wrongful death.

While the case was originally brought on the law side of the docket and at least two pre-trial conferences were had, no order was entered on such pre-trial conferences. However, the Court announced some two weeks prior to the trial that it would sustain a motion of the plaintiff to transfer the case into admiralty. This motion was opposed by the defendant because it was inconsistent with the former positions taken by the plaintiff and because it deprived the defendant of the right to a jury trial, to which the defendant is entitled under the wrongful death act of West Virginia (Code 55-7-5, 6). On this state of the record and without an order defining the issues, the case came on for trial on May 13, 1957, before a judge sitting without a jury in admiralty.

The respondent Carbide submits that the District Court committed error in proceeding to determine the amount of recovery under the West Virginia Wrongful Death Act, without a jury.

A jury trial is not foreign to admiralty. The Great Lakes Act, 5 Stat. 726, 28 U. S. C. A. § 1873, provides for a jury trial, as follows:

> "In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters concerning said

lakes, the trial of all issues of fact shall be by jury if either party demands it."

See reference to this subject in *Romero* v. *International Term. Operat. Co.*, 358 U. S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368, 381 (1959).

Since admiralty is required to provide a jury trial in all suits brought under The Great Lakes Act, why likewise it is not required to provide a jury trial for suits under the West Virginia Wrongful Death Act where assessment of damages by a jury is mandatory. The two Acts are indistinguishable in this respect, and the Legislature of the State of West Virginia has under the Constitution of that state the undoubted right and power to so provide.

F. A breach of the warranty of seaworthiness, a maritime principle, resulting in death does not give rise to a cause of action under the West Virginia Wrongful Death Act.[18]

The West Virginia Wrongful Death Act provides a cause of action for the death of a person when death is "caused by wrongful act, neglect, or default." It has never been decided by the West Virginia Supreme Court of appeals or by any other court whether a breach of the warranty of seaworthiness, a maritime principle, constitutes a "wrongful act, neglect, or default" under the West Virginia Act. It was not decided by the District Court or by the Court of Appeals in this case, the Court of Appeals taking the position that it was not necessary to decide the issue "because Goett was not a person to whom the warranty of seaworthi-

[18]Chapter 55, Article 7, Section 6, of the Official Code of West Virginia, 1931, as amended.

ness ran, and because we do not agree with the finding of the district judge that the barge was unseaworthy."

Accordingly, before this Court may decide that the warranty extended to the decedent and that it was breached, it must decide for the first time that a breach of the warranty of seaworthiness constitutes a "wrongful act, neglect, or default" under the West Virginia Wrongful Death Act. Thus, *The Tungus* v. *Skovgaard*, supra. ("We cannot say its (Court of Appeals) conclusion is clearly wrong"), and *United N. Y. & N. J. S. H. Pilots Asso.* v. *Halecki*, supra, ("But even if the Wrongful Death Act of New Jersey be interpreted as importing the federal maritime laws of unseaworthiness, . . ."), are to be distinguished. The issue here should not be decided for the first time by this Court, but the West Virginia Wrongful Death Act's construction in this particular (if the court reaches this question) "should be sought under readily available state procedure; from the state court, while the case is held in the federal court." See Mr. Justice Frankfurther's concurring opinion in *Skovgaard*.

VII.

The Court of Appeals and the District Court were correct in holding that the warranty of seaworthiness does not extend to the decedent, a shorebound employee of an independent contractor engaged in sandblasting a non-self-propelled and unmanned barge which had been withdrawn from navigation and delivered into the sole custody and control of Amherst, the independent contractor, for repairs requiring drydocking.[19]

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[19]United N. Y. & N. J. S. H. Pilots Asso. v. Halecki, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541, 544 (1959); Desper v. Starved

In his conclusions of law, the District Judge found that this case was not one "for the applicability of the doctrine of liability without fault." (R. p. 196)

While the Court of Appeals discussed at some length the warranty of seaworthiness and its application to the decedent, only the most pertinent part of that discussion will here be quoted:

> ". . . Goett was not a person to whom the warranty of seaworthiness ran . . .
>
> * * * *
>
> ". . . In the instant case . . . , the barge had been temporarily withdrawn from navigation and delivered into the sole custody and control of Amherst, the dry-dock company. While in extent the work was not as great as in Berryhill (*Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (9th Cir. 1956), cert. den. 354 U. S. 938, 77 S. Ct. 1400, 1 L. Ed. 2d 1537 (1957)), Berge (*Berge* v. *National Bulk Carriers*, 251 F. 2d 717 (2d Cir. (1958)) and Raidy (*Raidy* v. *United States*, 252 F. 2d 117 (1958)), in character it was the same, because it could not be done by the regular crew, but required that the vessel be withdrawn from navigation and turned over to

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Rock Ferry Co., 342 U. S. 187, 72 S. Ct. 216, 96 L. Ed. 205 (1952); Pope & Talbott v. Hawn, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); Seas Shipping v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946); West v. United States, 256 F. 2d 671 (1958), cert. granted, 359 U. S. 924 (1959); Raidy v. United States, 252 F. 2d 117 (1958); Berge v. National Bulk Carriers, 251 F. 2d 717 (2d Cir. 1958); Berryhill v. Pacific Far East Line, 238 F. 2d 385 (9th Cir. 1956), cert. den., 354 U. S. 938, 77 S. Ct. 1400, 1 L. Ed. 2d 1537 (1957); Mitchell v. Trawler Racer, Inc., 265 F. 2d 426 (1st Cir. 1959); Lundberg v. Prudential Steamship Corp., 102 F. Supp. 115 (S. D. N. Y., 1951); see generally annotation entitled "Who are 'seamen' within the meaning of the Jones Act—federal cases," 96 L. Ed. 211.

> a drydock company having special facilities and equipment for the work. The work order called for drydocking of the vessel; without such drydocking the bottom and sides of the barge would have been inaccessible. The warranty of seaworthiness does not apply in that situation."

The respondent Carbide submits that the District Court and the Court of Appeals were correct in holding that the warranty of seaworthiness did not extend to the decedent.

Reference will be made again to the contract between Carbide and Amherst, the pertinent aspects of which are contained in the Court of Appeals statement of facts, which is largely undisputed by the petitioner. (See Petitioner's Brief, pp. 4 and 5.)

> "... In October, 1955 Carbide contracted with Amherst for a biennial drydocking, certain welding, repairs and improvements to the barge, including installation of twenty-four Butterworth hatches and painting, not only of the deck and boot topping but also of the bottom and sides, with preparation for the painting by means of sandblasting. The work was to be done in according with Garbide's written specifications. A large portion of the painting had to be performed in drydock, but the details of the work were at the discretion of Amherst, which had exclusive control of the barge during the performance of the contract, subject only to the specifications."

At the outset one thing is to be emphasized, that is, this barge did not have a crew, it was unmanned; thus the work of the decedent could not have been that traditionally performed by seamen within the meaning of *Sieracki* and *Hawn* (see footnote 19 of this brief)

because no seaman had ever been assigned to this barge. In the *Sieracki* case, this Court extended the warranty of seaworthiness to stevedores, in the words of Mr. Justice Burton in his dissenting opinion to *Peterson* v. *Alaska Steamship Co.*, 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1954), ". . . largely on the premise that the stevedores were then rendering services usually and formerly performed by the crew."

The justification for the rigid standard of the doctrine of seaworthiness was said in *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561, to be as follows:

> ". . . We have often had occasion to emphasize the conditions of the seaman's employment . . . which have been deemed to make him a ward of the admiralty and to place large responsibility for his safety on the owner. He (the seaman) is subject to the rigorous discipline of the sea, and all the conditions of his service constrain him to accept, without critical examination and without protest working conditions and appliances as commanded by his superior officers."

What "rigorous discipline of the sea" was the decedent subjected to? What "conditions of his service constrain(ed) him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers." To answer the first and to paraphrase Judge Lumbard in his dissent to *Halecki* in the Second Circuit (251 F. 2d 708, 715), the decedent risked all such hazards and was subject to such "vigorous discipline of the sea" as a shorebound employee might experience them on a calm clear afternoon in early October on a flat surface of a barge

(R. 35) moored securely to the shore and floating on the calm Kanawha River. Surely, the decedent in operating a sandblasting machine on the flat deck of the barge CC-204 was subjected to less danger than a repairman employed to repair a leaking roof of an average house.

In determining who is a "seaman" within the Jones Act, it has been frequently decided that a person is not a seaman, although he works aboard a ship, if the ship is not in navigation. Annotation, 96 L. Ed. 217. The status of the vessel has been an important factor in determining who is a seaman (see *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 72 S. Ct. 216, 96 L. Ed. 205 (1952)), even when a shorebound employee is performing seamen's work. Such was an important consideration in the decision by the Court of Appeals in this case that the warranty of seaworthiness did not extend to the decedent.

In *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (9th Cir. 1956), cert. den., 354 U. S. 938, 77 S. Ct. 1400, 1 L. Ed. 2d 1537 (1957); the status of the vessel played an important part in that court's decision that the warranty did not extend to a shoreside machinist injured aboard a vessel while dry-docked for repairs. In the *Berryhill* case, the court made the following observations which are here pertinent:

> "Here the repairs had nothing to do with loading or unloading the ship. * * * Not all repairs are 'ship's work' to be performed, historically or currently, by the crew.
>
> "The Supreme Court (in the *Hawn* case footnote 19 of this brief) refers to the repairs Hawn

was making to the loading equipment as 'slight'. The purpose of his repairing was to permit the loading 'to go on at once.' This would indicate a doubt in the Court's mind if any very general repairs to a ship could, or should be included as 'ship's work.' In the instant case, the repairs were nothing of an improvised, hurried nature, done to save the 'ship work' time, but were of sufficient importance to cause the ship to be dry-docked." (In the instant case, the barge was not in fact dry-docked until the day following the decedent's death; that was within the discretion of Amherst.)

* * * *

"The appellant has his statutory remedy against his employer. Longshoremen's and Harbor Workers' Compensation act, 33 U. S. C. A. §901 et seq. He has his common law remedy as a business invitee against the shipowner, if he can prove the latter's negligence. In view of such rights and protection, he does not need, nor should he ask, for the further extension of a doctrine already stretched. If there exists a social need for such an extension (which we doubt in view of existing remedies), it is a matter for Congressional enactment, and not for this Court to bring about thru judicial legislation."

In *United N. Y. & N. J. S. H. Pilots Asso.* v. *Halecki*, supra, discussed infra, this Court noted in refusing to extend the warranty to Halecki, that the work which he was doing was not "connected with a ship's seagoing operations."

In *West* v. *United States*, 256 F. 2d 671, 673 (3d Cir. 1958), cert. granted, 359 U. S. 924, the Third Circuit held that the warranty did not extend to shore-

bound engineer employed on a merchant ship being reconditioned for navigation. The Court reasoned, in part, as follows:

> "It may be possible to say, as the Supreme Court has, that a stevedore loading or unloading a ship (Sieracki, supra), or a carpenter repairing grainloading equipment on a ship in active navigation (Pope & Talbot, Inc., v. Hawn, 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143), are performing work of a maritime nature. But this libelant was a shoreside engineer who came on board to work on the rehabilitation job preparatory to getting the ship back into service. That is not something which bears any resemblance to marine navigation."

Carbide's barge, the CC-204, had likewise been withdrawn from navigation at the time of decedent's employment thereon. It was, as has been shown, in biennial drydock for substantial renovation and repairs, part of which involved sandblasting preparatory to painting. The status of the barge at the time with which we are here concerned precluded the extension of the warranty to the decedent.

Yet for another reason the warranty did not extend to Goett, that is, he was not performing a work usually performed by the crew. In the recent *Halecki* case, *supra*, this Court, in reversing the Court of Appeals for the Second Circuit, held that the warranty of seaworthiness did not extend to Halecki, a shorebound employee of an independent contractor, who was on board a ship to clean its generators with carbon tetrachloride. This Court reasoned as follows:

> "Neither these decisions nor the policy that underlies them can justify extension of liability

for unseaworthiness to the decedent in the present case. The work that he did was in no way the type of work traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was dead with its generators dismantled. Moreover, it was the work of a specialist, requiring special skill and special equipment—portable blowers, air hoes, gas masks and tanks of carbon tetrachloride, all brought aboard the vessel for this special purpose, and none connected with a ship's seagoing operations.

* * * *

"It avails nothing to say that the decedent was an electrician, and that many modern ships carry electricians in their crew. Pope & Talbot, Inc. v. Hawn explicitly teaches that such labels in this domain are meaningless. See 346 US at 413. It is scarcely more helpful to indulge in the euphemism that the decedent was cleaning part of the ship, and to say that it was a traditional duty of seamen to keep their ship clean. The basic fact is, in the apt words of Judge Lumbard's dissenting opinion in the Court of Appeals, that the decedent was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed. 251 F2d 708, at 715. To extend liability for unseaworthiness to the decedent here would distort the law of Mahnich, of Hawn and of Sieracki beyond recognition. We therefore hold that it was error to instruct the jury that the shipowner could be held liable in this case even if they should find that the shipowner had exercised reasonable care."

So, in the instant case, the decedent in using a sandblasting machine, while wearing a respirator and hood, was using special equipment brought aboard the barge

and not "connected with (the) ship's seagoing operation." The decedent in using this special equipment, was " 'not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed.' " Accordingly, respondent Carbide submits that the District Court and the Court of Appeals were correct in holding that the warranty of seaworthiness did not extend to the decedent.

VIII.

Assuming that the warranty of seaworthiness extended to the decedent, the Court of Appeals was correct in holding that the barge CC-204 was not unseaworthy.[20]

The Court of Appeals not only held that the warranty of seaworthiness did not extend to the decedent, but also held that the "barge was not unseaworthy," reasoning that "(i)n its ordinary operations, it was unmanned, and did not require life saving eqiupment. It did not become unseaworthy when men went aboard after it had been turned over to a repair yard under the circumstances of this case."

By certificate issued April 6, 1955 (R. 217), the United States Coast Guard certificated Carbide's barge, CC-204, as an unmanned tank barge. This barge had no crew and the determination of its status by the Coast Guard should not be subject to collateral attack in the

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[20]Lester v. United States, 234 F. 2d 625 (2d Cir. 1956), cert. granted, 352 U. S. 889, 77 S. Ct. 130, 1 L. Ed. 2d 85; dismissed per stipulation pursuant to Rule 60 of the Rules of this Court, 352 U. S. 983, 77 S. Ct. 384, 1 L. Ed. 2d 366 (1957).

absence of direct allegations of fraud or impropriety which do not exist here.

The *Lester* case, *supra*, presents a factual situation similar to the one in the instant case.

Libellant (Lester) was employed by Marine Basin as an assistant electrician and in the course of his employment boarded a motor yacht owned and operated by the U. S. Army. "To determine whether the vessel's running lights were operative, libellant left the pilot house, took three or four steps on the deck aft the pilot house (known as the 'trunk top'), lost his footing and fell overboard to the floor of the dry dock. * * * Thus, libellant, for some unexplained reason, fell from an unobstructed and virtually level canvas-covered surface across and past the main deck to the floor of the dry dock below."

On an allegation of unseaworthiness, the Court said, "We do not think that the United States was under any obligation to provide the Q-100 with main deck guard railings against the remote possibility that an experienced dry dock worker such as libellant would fall from the trunk top roof some 18 to 24 inches above the main deck. * * * The United States provided libellant with a motionless, unobstructed, and virtually level canvas-covered surface from which libellant, an experienced dry dock worker, could observe whether the running lights were operative. With the exercise of reasonable care, libellant could have performed the task in safety." The Court concluded, "Since we hold the ship was not unseaworthy we do not reach the question of whether the trial court's finding that libellant was not negligent is clearly erroneous."

In the instant case it is not contended that the barge was unseaworthy for navigation. Petitioner's contention is that additional equipment is required when the barge is withdrawn from navigation. We have found no case so holding. The Court of Appeals was clearly right in holding the barge to be seaworthy.

IX.

For any damages the petitioner may recover from Carbide in this case, Carbide is entitled to be indemnified by Amherst under the express terms of contracts between Carbide and Amherst, and by reason of Amherst's breach of its implied contractual duty to do the work contracted for in a safe and workmanlike manner.[21]

After the institution of the instant suit by the petitioner against respondent Carbide, Carbide filed a third-party complaint (R. 5) against Amherst Barge Company alleging that it was entitled to be indemnified by Amherst for any recovery had against it by reason of a breach of Amherst's implied contractual

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[21]Crumady v. Joachim Hendrik Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413 (1959); Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956); Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 355 U. S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491 (1958); Halcyon Lines v. Haenn, 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318 (1952); American President Lines v. Marine Terminals Corp., 234 F. 2d 753, 759 (9th Cir. 1956), cert. den., 352 U. S. 926, 77 S. Ct. 222, 1 L. Ed. 2d 161 (1956); United States v. Rothschild International Stevedoring Co., 183 F. 2d 181 (9th Cir. 1950); American Stevedores v. Porello, 330 U. S. 446, 91 L. Ed. 1011 (1947), and upon remand Porello v. United States, 94 F. Supp. 952 (S. D. N. Y., 1950); Hunt v. Bank Line, 35 F. 2d 136 (4th Cir. 1929); Sunday Creek Coal Co. v. Gray, 238 F. 325 (4th Cir. 1916); 56 C. J. S. Master and Servant, § 205; 35 Am. Jur., Master and Servant, § 188.

duty and by reason of a breach of the express terms of the contract between Carbide and Amherst. Amherst's answer (R. 7) to Carbide's third-party complaint denied any duty or obligation to indemnify Carbide.

With respect to Carbide's claim for indemnification from Amherst, the District Judge held:

> ". . . My conclusion of law is that there is no liability from the third-party defendant to the third-party plaintiff arising out of the judgment herein awarded to plaintiff Ellen Goett Administratrix, etc., against Union Carbide & Carbon Corporation." (R. 237)

The District Judge had earlier found that "(f)ailure to provide rescue equipment was the proximate cause of Goett's death," and that Carbide was negligent in failing to provide this equipment. (R. 194)

The District Judge thus found that the proximate cause of the decedent's death was the failure of Carbide to provide rescue equipment on its barge, and that Amherst was not only not negligent in failing to provide its own employees with available rescue equipment, but also was not negligent in not furnishing the decedent with a life jacket and in not erecting railings or stanchions on the barge. In a word, the District Judge found that there was no duty on the part of Amherst to provide its own employees with a reasonably safe place to work, and at the same time imposed a greater duty upon Carbide towards these employees of an independent contractor than the law provides.

The Court of Appeals did not reach the question of Carbide's right to indemnification from Amherst, for

it decided that there had been no breach of any duty owed by Carbide to the decedent and that the warranty of seaworthiness did not extend to the decedent nor was the barge CC-204 in fact unseaworthy.

Respondent Carbide submits that the findings and conclusions of the District Court that there was no negligence on the part of Amherst towards its own employee, the decedent, are clearly erroneous and should be reversed by this Court if it gets to the question of Carbide's right to indemnification from Amherst.

While, as noted, the Court of Appeals did not reach the question of the right to indemnification, it did consider the duty which Amherst owed to its own employees and we think it stated the law correctly, as follows:

> "... It was the duty of Amherst to supply its employees with a reasonably safe place in which to work. It knew and controlled the conditions of the work and the equipment which would be used. It was Amherst's responsibility to decide whether a temporary railing or stanchions should be erected, whether its men should be required to wear preservers, and whether and where life rings and other rescue equipment should be mounted. For negligence in any of these respects it would be liable to plaintiff herein for damages, were it not for the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901-905. But Carbide is not liable to plaintiff for negligence, it breached no duty it owed Goett." (In a footnote the Court notes that "(u)nder the terms of that Act (Longshoremen's) Goett's wife and children are now entitled to receive,

without proof of negligence on anyone's part, compensation which may exceed the maximum amount recoverable under the West Virginia Wrongful Death Act.")

In *Porello* v. *United States*, 94 F. Supp. 952 (S. D. N. Y. 1950), after remand of the case from this Court (330 U. S. 446, 91 L. Ed. 1011), Judge Kaufman in quoting from the Court of Appeals opinion before remand (153 F. 2d 607-608) said, "The primary duty to furnish its employees a safe place to work rested on the stevedore. (independent contractor and employer). It was in control of the conditions under which the work was to be done and its foreman knew the bolt was missing and should have foreseen the danger and avoided it."

So, in the instant case, Frederick P. Martin, superintendent of maintenance for Amherst, testified that two days prior to the decedent's death he was on board the CC-204 and noted that there were no stanchion lines or railings around the outer decks of the barge nor life rings or life buoys or similar equipment on board. (R. 138)

Thus, Amherst was aware of the condition of the barge before the decedent was assigned to the sandblasting operation. Being aware of the lack of safety and rescue equipment (the normal condition of the barge), it was incumbent upon Amherst to take such corrective measures to furnish its employees with a reasonably safe place to work. In the Fourth Circuit case of *Sunday Creek Coal Co.* v. *Gray*, 238 F. 325 (4th Cir. 1916), the Court said:

"If the work be of hazardous nature, the master is liable, not for the danger to which the ser-

> vant is necessarily exposed, but for negligence in failing to make reasonable provision for the servant's safety."

In 56 C. J. S., Master and Servant, § 205, it is written:

> "It is actionable negligence on the part of the master to fail to furnish or fail to exercise ordinary or reasonable care to furnish, the servant with such proper tools and appliances that maybe required for the reasonably safe prosecution of the work, and he cannot escape liability for failing to furnish proper safety appliances because they might have not been effectual or might not have been used if at hand."

And in 35 Am. Jur., Master and Servant, § 188, it is said:

> "Liability on the part of the employer for injury incurred by an employee in the course of his employment is predicable of a failure on the employer's part to furnish for the use of the employee injured an instrumentality such as a scaffold, where the employer ought to have anticipated that the calamity would result from the employee's working without the appliance."

It was, therefore, incumbent upon Amherst to supply the decedent and its other employees on the CC-204 "such proper tools and appliances that may be required for the reasonably safe prosecution of the work." Amherst's duty to its own employees was not less than that of Carbide; indeed, as previously pointed out in Point VI-A of this brief, we believe that Amherst had a higher duty to the decedent and his fellow employees than Carbide. The District Judge, on the other hand, found a higher duty on Carbide than on Amherst. To

apply his findings to an anologous situation, a homeowner has a greater duty to furnish the employees of a roofing contractor with safety ladders, ropes, scaffolding, etc., than the independent contractor, the employees' own employer, has. This we submit is clearly error. If Carbide breached a duty it owed to the decedent *a fortiori*, Amherst breached a duty also. If Carbide was guilty of an omission, so likewise was Amherst.

Having shown that Amherst was also negligent towards the decedent, is Amherst required to indemnify Carbide for any recovery which the petitioner may have against Carbide in this case? This District Judge made no finding on this precise question in that it found no negligence on the part of Amherst. And the Court of Appeals, as previously noted, did not reach this question for the reasons already stated.

Halcyon Lines v. *Haenn*, 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318 (1952), established the principle that a shipowner, who has paid a judgment obtained by a contractor's employee for injuries sustained aboard ship while engaged in making repairs, has no right of contribution against the contractor as joint tortfeasor. While the *Halcyon* case precludes Carbide from recovering contribution from Amherst, the employer of the decedent, it does not preclude a recovery based upon a contractual right of indemnity. *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 100 L. Ed. 133 (1956); *American President Lines* v. *Marine Terminals Corp.*, 234 F. 2d 753, (9th Cir. 1956), cert. den., 352 U. S. 926, 77 S. Ct. 222, 1. I. Ed. 2d 161 (1956).

Carbide submits that it is entitled to indemnification from Amherst for any recovery by the petitioner against Carbide in this case by reason of (A) the terms of an express contract between Carbide and Amherst (R. 208), and (B) by reason of Amherst's breach of its implied contractual duty to do the work contracted for in a safe and workmanlike manner. *Crumady* v. *Joachim Hendrick Fisser*, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413 (1959).

(A) The terms of an express contract obligate Amherst to indemnify Carbide.

The purchase order agreement whereby Amherst agreed to provide the labor and furnish the materials for sandblasting, painting, and installing Butterworth hatches on the CC-204 (R. 207) contains two provisions which properly interpreted bind Amherst to indemnify Carbide for any recovery against it in this case. These provisions set forth under the "Terms and Conditions" of the contract (Pl. Ex. 12 R. 208) relate to "INSTALLATION" and "INSURANCE" and read as follows, the matter within parentheses having been inserted for clarity:

> "INSTALLATION: In the event that any articles ordered hereunder require, in connection with the installation thereof, the services of a supervisor, expert, or other employee connected with or employed by Seller (Amherst), and Seller (Amherst) agrees to furnish the same, either with or without charge, such supervisor, expert or other employee in performing such service shall not be deemed to be the agent or employee of Buyer (Carbide), and Seller (Amherst) assumes full responsibility for

his acts and *omissions*, and exclusive liability for any payroll taxes or contributions imposed by any federal or state law dealing with any of the subjects covered by the Federal Social Security Act approved August 14, 1935." (Italics supplied.)

"INSURANCE: If this agreement provides for work to be performed by Seller (Amherst) on property owned or controlled by Buyer (Carbide) or on property of others named herein, Seller (Amherst) shall insure to each of its employees engaged upon the work the compensation provided for by and shall strictly comply with, each and every statute applicable thereto with respect to Workmen's Compensation and/or Employers' Liability and shall procure and maintain, at the cost and expense of the Seller (Amherst,) until final acceptance of the work by the Buyer (Carbide). Public Liability Insurance in a reputable and financially responsible insurance company, property safeguarding the Seller (Amherst) against liability for injuries to persons, including injuries resulting in death, in amounts acceptable to the Buyer (Carbide) and shall furnish to Buyer (Carbide) written certificates from insurance carriers or from appropriate Governmental authorities establishing that said insurance of employees and said Public Liability Insurance have been procured and are being properly maintained, and that the premiums therefor are paid, and specifying the names of the insurers and the respective policy numbers and expiration dates. All such insurance policies shall provide (unless by statute applicable thereto it is otherwise provided) that in the event of cancellation thereof, written notice of such cancellation shall be effective date of such cancellation."

The essence of the first provision, relating to "INSTALLATION," is that Amherst "assumes full responsibility" for any "omissions" on the part of any supervisor, expert or other employee furnished by Amherst in connection with the installation of the articles ordered, namely, the sandblasting and painting of the CC-204. As previously pointed out, Frederick P. Martin, superintendent of maintenance for Amherst, testified that two days prior to the decedent's death he was on board the CC-204 and noted that there were no stanchion lines or railings around the outer decks of the barge nor life rings or life buoys or similar equipment on board. (R. 138) Earlier Mr. Martin had testified that it would be as much his responsibility as anybody's in Amherst's employment to order lifesaving equipment aboard the barge. (R. 77) Amherst having had the duty of furnishing its employees with a reasonably safe place to work and having had at least an equal duty if not a greater one than Carbide to supply the barge with rescue equipment, as have been shown, the *omission* on the part of Mr. Martin, attributable to Amherst, in failing to order rescue equipment aboard the barge, after having noted its absence, is one for which Amherst has assumed "full responsibility" under its contract with Carbide. See *Porello* v. *United States*, 94 F. Supp. 952 (S. D. N. Y. 1950), wherein Judge Kaufman in quoting from the Court of Appeals before remand (153 F. 2d at p. p. 607-608) said with respect to a somewhat similar provision in a contract between vessel owner and libelant's employer:

> " 'The primary duty to furnish its employees a safe place to work rested on the stevedore. It was in control of the conditions under which the work was to be done and its foreman knew the

> bolt was missing and should have foreseen the danger and avoided it. Although the stevedore's default in that respect might not relieve the shipowner from liability to the injured workman, it would make it reasonable for the shipowner to insist that the stevedore alone bear the loss, and the quoted provision was inserted in the contract for that purpose'."

In conclusion, the omission on the part of Amherst in failing to place rescue equipment on the barge is the source of this suit against Carbide, and under Amherst's agreement to assume "full responsibility" for the default, Carbide is entitled to be indemnified for any recovery had herein.

The second provision of the purchase order agreement upon which Carbide relies for right of idemnity from Amherst is the provision relating to "INSURANCE," quoted above. The gist of this clause is that Amherst agreed to insure its employees, including decedent, with Workman's Compensation and/or Employer's Liability insurance. While this provision does not contain an express hold harmless clause, it, having been inserted into Carbide's form contract, was obviously intended for Carbide's benefit; there would be no reason to incorporate it into the agreement for Amherst's sole benefit. We think the reasoning of Judge Kaufman in *Porello v. United States*, supra, quoted earlier, applies with equal force in ascertaining the meaning and intent of the instant provision, that is, that while the default of Amherst may not relieve Carbide from liability, it would make it reasonable for Carbide to insist that Amherst alone bear the loss, and the provision here being discussed was inserted in the contract for that purpose. This is not to argue that

Carbide attempted to or could contract away liability for its own negligence, if any. But we think Carbide could and did in this instance require its contractor, Amherst, to provide insurance coverage to protect it against direct or indirect claims, and that under this provision Carbide is entitled to indemnification for any damage which may be awarded against it in this proceeding.

B. Carbide is entitled to indemnity against Amherst for any recovery had in this case by reason of Amherst's breach of implied contractual duty to do the work contracted for in a safe and workmanlike manner.

Aside from Amherst's express contractual obligation to indemnify Carbide, Carbide is also entitled to be indemnified by Amherst for any recovery had herein by reason of a breach of an implied contractual duty to carry on the sandblasting operation on the CC-204 properly, safely, and in a workmanlike manner. Competency and safety in the performance of its contract were inescapable elements of the service undertaken by Amherst. *Ryan Stevedoring Co.* v. *Pan-Atlantic SS. Corp.* supra; *Weyerhaeuser S. S. Co.* v. *Nacirema Operation Co.*, 355 U. S. 563, 79 S. Ct. 438, 2 L. Ed. 491 (1958); *American President Lines* v. *Marine Terminals Corp.* supra.

In the *American President Lines* case, a longshoreman, employed by Marine Terminals Corporation, had recovered a judgment for personal injuries against the American President Lines, Ltd., the owner of the steamship President Polk, on which the longshoreman was performing stevedoring services when injured. The

injuries were caused by a defective strongback which fell and hit the longshoreman.

The contract between American and Marine for the stevedoring services contained no express provisions for indemnity. American brought an action against Marine for indemnity, basing the same among others upon Marine's breach of its implied contractual duty to do its work in a safe and workmanlike manner, that is, under the *Ryan* doctrine.

The Court of Appeals allowed indemnification based upon Marine's breach of its implied contractual duty, mainly on the ground that Marine, the independent contractor, had knowledge of the defective beam, yet permitted its employees to work in the face of the danger without taking any precaution for his safety.

The Court in its opinion said:

> "We are not concerned here with a situation in which the stevedore's breach of duty brings about the injuries by operation upon a prior condition caused by the shipowner's negligence which is unknown to the stevedore. Here the stevedore was fully informed of the fact and of the possible consequences of the shipowner's negligence or of the ship's unseaworthiness, and in face of all that proceeded to breach its duty so as to make that negligence an immediately dangerous force. It is true that here, unlike Ryan (referring to the *Ryan* case), there was an act of unseaworthiness or negligence by the shipowner prior to the conduct of Marine, and that the shipowner's negligence consisted of failing to supply a proper device, rather than a failure to discover and correct the breach of duty as in the *Ryan* case. But this is no ground of distinc-

tion, for in the case at bar, as in Ryan, it was the stevedore's breach of duty that created the danger and made it an active condition with immediately foreseeable consequences of personal injury."

In the instant case, Amherst was also fully informed of the fact that there was no safety or lifesaving equipment on the barge before it sent its employees onto the barge to commence the work it contracted to do (R. 138, 77). It therefore breached its implied contractual duty to perform the work it contracted to do for Carbide safely and in a workmanlike manner through its failure to provide its employee, the decedent, with any safety device, e. g., a life jacket, and/or rescue equipment. Consequently, under the *Ryan* and *American President Lines* cases, Amherst should indemnify Carbide for any recovery allowed in this proceeding against the latter.

The very recent case of this Court, *Crumady* v. *Joachim Hendrik Fisser*, supra, emasculates any distinction between the instant case and *Ryan* and *Weyerhaeuser* on the grounds that therein the contractor-employer created the dangerous condition and that its fault preceded that of the shipowner in point of time. *Crumady* also strikes down any supposed *rationale* of these cases which states that a promise of indemnity will be allowed only where the owner is without any actual fault of his own. In *Crumady*, the vessel owner in setting a circuit breaker on a winch at twice the safe working load of the rigging rendered the vessel unseaworthy and this preceded in point of time the negligent act of the contractor in disregarding the safe load limits of the rigging; nevertheless, this Court found that the

negligence of the stevedores (the independent contractor), which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, and the vessel was allowed to recover over against the contractor.

So, in this case, Amherst brought into play the unseaworthiness, if any, of the CC-204, and the negligence, if any, of Carbide by assigning its employees and in particular the decedent to sandblast the CC-204 without placing on the barge rescue equipment and other safety devices, which it knew were not on the vessel (R. 138). For its failure in this regard, it did not perform its contract with Carbide with competency and reasonable safety; accordingly, under the foregoing cases, Carbide is entitled to be indemnified by Amherst for any recovery herein by reason of Amherst's breach of its implied contractual duty to do the work contracted for in a safe and workmanlike manner.

As a final note, it should be pointed out that the Longshoremen's and Harbor Workers' Compensation Act allows but one recovery: compensation under the Act or a recovery from a third person. The plaintiff below cannot have both. As was stated by Judge Parker in *Hunt* v. *Bank Line*, 35 F. 2d 136 (4th Cir. 1929).

> "If he desires to assert his cause of action against a third person, he may do this without forfeiting his right to compensation, provided he gives the notice and files proceedings as the statute provides. In the latter case he must make his election and notify the commission before receiving compensation under the act, and, having done so, he will not receive compensation until

> the action against the third person is tried and determined, and then will receive only the amount of the difference between the recovery against the third person and the compensation which the act provides. He can elect which course he will follow, *but he cannot follow both.*" (Emphasis supplied.)

This is true of course because the Act (33 U. S. C. A. 933 (a)) provides, inter alia, "* * * he may elect * * * to receive such compensation *or* to recover damages against such third person." (Emphasis Supplied.)

As indicated by Judge Parker, the plaintiff cannot lose. The question is, "Who should pay?"

CONCLUSION

Carbide therefore respectfully urges:

1. That the judgment of the Court of Appeals should be affirmed because no negligence has been shown against it.

2. That plaintiff's right, if any, is predicated upon the West Virginia Wrongful Death Statute, which must be taken *cum onere*, and would preclude recovery herein by reason of the contributory negligence or assumption of risk by plaintiff's decedent and in any event the failure of the District Court to assess damages as required by the West Virginia Statute would require review if Carbide is found liable.

3. That if recovery is permitted against Carbide, it is obviously limited to $20,000.00, the maximum allowed by the West Virginia Wrongful Death Act.

4. That Carbide is entitled to full indemnification from Amherst for any recovery permitted against Carbide in this proceeding.

Respectfully submitted,

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OCTOBER TERM, 1959

No. 3

ELLEN GOETT, as Administratrix of the Estate of MARVIN PAUL GOETT, deceased.

Petitioner,

v.

UNION CARBIDE CORPORATION and AMHERST BARGE COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT, AMHERST BARGE COMPANY

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BRIEF FOR RESPONDENT, AMHERST BARGE COMPANY

I.

Opinions Delivered In The Courts Below

The initial findings of facts and conclusions of law of the District Court are found at pp. 194 to 197 of the printed record. Further findings of fact and conclusions of law of the District Court, with respect to the third party complaint of Union Carbide Corporation against Amherst Barge Company, are found at pp. 236-237 of the printed record.

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 256 F. 2d 449, and is also to be found at pp. 241-250 of the printed record.

II.

Statutes Involved

This action is based upon the West Virginia Wrongful Death Act, Chapter 55, Article 7, Sections 5, 6 and 8, of the West Virginia Code of 1955 (Michie's, Sec. 5474, 5475 and 5477). These statutory provisions are quoted in footnote "2" of the Court of Appeal's opinion (R. pp. 244-245).

III.

Questions Presented

The following questions arise upon the petition for certiorari in this case:

1. Does the maritime law allow recovery for the allegedly wrongful death of Petitioner's decedent, independently of the Wrongful Death Act of West Virginia?
2. When admiralty adopts a state wrongful death statute as a rule of right to be administered within its own jurisdiction, must it take the right subject to the limitations which have been made a part of its existence?
3. Does the Wrongful Death Act of West Virginia provide a remedy for unseaworthiness of a vessel; and, if so, was Petitioner's decedent within the application of the doctrine of recovery for unseaworthiness?
4. Was the barge unseaworthy?

5. Was the respondent, Union Carbide Corporation guilty of negligence?

6. If the respondent, Union Carbide Corporation, was guilty of negligence, is recovery barred by Goett's assumption of risk, and/or contributory negligence?

7. If the respondent, Union Carbide Corporation, is liable for Goett's death, is it entitled to indemnity from Amherst?

IV.

Statement of the Case

This action was brought by the administratrix of Marvin Paul Goett, against Union Carbide Corporation, to recover damages for Goett's allegedly wrongful death by drowning as a result of having fallen overboard from a barge owned by Carbide, on October 5, 1955. At the time of Goett's fatal accident he was employed by Amherst Barge Company and was engaged in the repair of the barge pursuant to a contract between Amherst and Carbide.

The complaint (R. p. 1) alleges that Carbide "owned, operated, managed and controlled" the barge "204", and was under a duty to keep and maintain the barge and its appurtenances in a safe and seaworthy condition; that Goett was employed aboard the barge as a "harbor worker" and "sandblaster", and as such had the status of a "seaman"; that while so employed he was caused to fall overboard from the barge and suffered drowning as a result of Carbide's alleged negligence in failing to keep and maintain the barge and its appurtenances in a seaworthy condition, failing to take "any means of precautions" for Goett's safety, failing to provide Goett with a safe place to work, and by failing to provide "life pre-

servers, life lines, safety nets and proper, adequate and sufficient safety men and other tools and equipment and other means of rescue" to safeguard Goett; that Goett was without any "contributory negligence" on his part; and that he left surviving him heirs and dependents upon whose behalf the action was brought.

Carbide thereupon filed its answer, (R. p. 9) denying essential allegations of the complaint and asserting twelve particular defenses thereto; and also filed a third party complaint against Amherst (R. p. 5). In its third party complaint Carbide alleged that its barge was, at the time of the accident, "in the exclusive care, custody, possession and control" of Amherst for purposes of repair, and that "the primary liability for any loss, damages or claims" on account of the accident would, "as a matter of law, be imposed upon said third party defendant because in absence of express contract a vessel owner is entitled to indemnity for amount recovered by contractor's employee, if negligence of contractor, having exclusive custody of vessel, is the sole, active or primary cause of accident in which contractor's employee is injured."

The third party complaint further alleged that by virtue of the express provisions of the contract between Carbide and Amherst, for the repair of the barge, Amherst is liable to Carbide for "all loss or damage which might have been incurred or occasioned by its care, custody and repair while said barge was in its exclusive care, custody and control."

Amherst, in its answer to the third party complaint (R. p. 7), denied that it was negligent; averred that if Goett's death resulted from negligence, such negligence was his own, or that of Carbide, or both; averred that it had complied with the provisions of the Longshore-

men's and Harbor Worker's Compensation Act (33 U.S.C.A. 901-950), and subscribed to the Compensation provided for therein; that Goett's dependents are entitled to compensation under that Act; and that such Act constitutes its exclusive liability on account of the accident. Amherst further denied any duty or obligation to indemnify Carbide against any claims, judgments or losses arising from the accident, and denied all liability and responsibility therefore, other than that imposed by the Longshoremen's and Harbor Worker's Compensation Act.

Amherst subsequently filed an amended and supplemental answer, more particularly alleging contributory negligence and assumption of risk upon the part of Goett, and Carbide filed a like amendment, pleading assumption of risk as a bar to the action. (R. pp. 21-22).

Over the objections of the respondents, the trial court transferred the action to the admiralty side of the Court, and trial was had thereon before the District Judge. The evidence adduced at the trial shows that Carbide contracted with Amherst for certain repairs and improvements to the former's chemical tank barge "CC-204" (R. 207-208), including sand blasting, painting, and certain other repairs, and also for the installation of "Butterworth hatches" (R. p. 214); all in accordance with Carbide's written specifications. In contemplation of such repairs, the barge was delivered to Amherst's dock at Reed, West Virginia, on October 1st, 1955 (R. pp. 137-138). The work contracted for, contemplated and required that the barge be hauled out of the river and placed high and dry on Amherst's "marine ways" (R. pp. 65-71), but, at the time of Goett's drowning, on October 5, 1955, the barge was still afloat on the Kanawha River, lying along shore just downstream from

Amherst's marine ways and boat anchorage, and was moored to and against the head of a so-called "digger boat" lying just downstream from the barge (R. pp. 34-35). The "digger boat" was attached to the shore by a semi-permanent ramp which also was the means of access to the barge from the shore (R. pp. 86-89, 98). The barge was made of steel, with the top consisting of a flat deck with a six inch "crown" (R. pp. 35-36). The height of the deck above the water was about nine feet (R. p. 35). Except for a pipe line running lengthwise in the center of the barge, it had no super-structure of any kind (R. p. 43). However, there were a series of "kevels" along the outer edge of the deck to assist in mooring (R. p. 43).

The barge had no railing around its deck, and it was not equipped with any life rings or buoys or similar equipment (R. p. 138). In these respects, Amherst made no alterations or removals from the barge as it was delivered by Carbide (R. pp. 138-139). It is not customary for such barges to be furnished or equipped with railings, life rings, buoys or similar equipment (R. pp. 124, 132, 138-139). The barge and its equipment had been inspected, certified and approved by the Coast Guard, and a certificate of inspection issued on April 1, 1955 (R. p. 217). Applicable Coast Guard regulations do not require that such barges be equipped with railings or life buoys (R. pp. 135-137). There was a ring type life buoy and attached line mounted on the "digger boat" at the downstream end of the barge (R. pp. 40, 44-45).

Goett began work on the CC-204 on October 4, 1955, and had worked on the barge for one full shift, and half of another when he fell overboard (R. pp. 50-51, 145-146). He was not wearing a life jacket (R. p. 40), although life jackets were readily available to any em-

ployee who desired to wear one while at work. (R. pp. 49, 140-141).

Goett was wearing a canvas hood over his head and shoulders to protect against flying sand from the sandblaster. (R. p. 48), and was also wearing a respirator (R. pp. 48-49). The sand blasting equipment used by Goett consisted of a heavy machine sitting on the deck of the barge, but movable from place to place, with two hoses and attached nozzles leading therefrom. Goett was holding one of the hoses and nozzles in his hands and was directing the sand blast against the surface of the deck while he walked slowly across it. When last seen on the barge, Goett was at a point very near to one of the kevels at the outboard edge of the barge (R. p. 59, See circle marked on photograph, R. p. 199). At that moment he was walking slowly backward toward a kevel at the outboard edge of the barge, and was facing inboard, toward the shore, with his back toward the river (R. p. 62). Within approximately one minute after being seen in that position, he was discovered in the river, just outboard of the position in which he was last seen on the barge (R. p. 37-38).

Goett's fellow workmen on the barge heard the noise of the sandblaster nozzle thrashing against the deck, and ran to the edge of the barge and looked over (R. p. 38). Goett was seen in the water, and men immediately went into the river after him (R. pp. 38, 46-47), but he fought these men off and prevented them from keeping a grip on him (R. pp. 46-47). He then slipped beneath the surface and was drowned. Amherst's maintenance superintendent, Martin, arrived on the barge at about the time Goett went under. He threw the ring type life buoy off the digger boat into the water, but Goett was already sinking at that moment. (R. pp. 47- 48, 143-144).

Goett's death is within the coverage of the Longshoremen's and Harbor Worker's Compensation Act; and Amherst, through its insurance carrier, stands ready to pay the benefits provided by that Act; but as of the time of the trial, no application for such benefits had been made by or on behalf of Goett's dependents (R. pp. 29-30, 31-33, 79).

The District Court found as facts (R. pp. 194-197): that Carbide should have foreseen that many of Amherst's employees would work on the barge; that under these circumstances it was negligence for Carbide not to equip the barge with safety and rescue equipment; that the barge was not seaworthy at the time Goett was drowned, for all the circumstances in which it was being used; that failure to provide rescue equipment was the proximate cause of Goett's death; and that Amherst had exclusive custody, care and control of the barge at the time Goett fell therefrom.

The District judge concluded: "this case is not one for the applicability of the doctrine of liability without fault. I think this is a negligence case and that negligence has been shown * * * "; that it was the duty of Carbide to furnish workmen who worked on the barge a safe place to work, and to that end to provide safety equipment, such as life lines or stanchions, to prevent their falling off the unprotected deck; that it was also the duty of Carbide to provide reasonably suitable rescue equipment, and to place such equipment in a position on the barge where it would be immediately available in case of need; that Goett was not guilty of any negligence contributing to his death; that Goett did not assume the risk of the failure of Carbide to have rescue equipment available; that plaintiff is entitled to recover $20,000.00, against Carbide, but that if the limitations in the West Virginia

Wrongful Death Act did not apply, plaintiff would have been entitled to recover $50,000.00, and that Carbide is not entitled to indemnity from Amherst.

Judgment having been entered in the District Court in favor of the plaintiff and against Carbide for $20,000.00, both the plaintiff and Carbide appealed. Amherst did not appeal, but filed an assignment of cross-error to the trial courts findings that Goett did not assume the risk that caused his death, and that he was not guilty of contributory negligence.

The Circuit Court of Appeals for the Fourth Circuit reversed, holding that: the maritime law does not allow recovery for wrongful death; that where death upon inland waters results from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given; that the West Virginia Wrongful Death Act, like other statutes patterned on Lord Campbell's Act, has created a new cause of action for the benefit of certain named beneficiaries, and has not perpetuated the cause of action which the deceased had before his death; that the right to maintain such a suit can be enforced in admiralty only in accordance with the substantive law of the state whose statute is being adopted; that any limitations in the state statute as to the amount and character of damages which may be allowed, are binding on the admiralty court; that it is unnecessary to decide whether a suit under the West Virginia Wrongful Death Act can be based on unseaworthiness, because Goett "was not a person to whom the warranty of seaworthiness ran", and "because we do not agree with the finding of the District judge that the barge was unseaworthy"; that

Carbide was not negligent in "delivering the barge to Amherst without mounting life rings or other safety equipment on the barge, or in failing to rescue Goett after he fell into the river, as contended by his administratrix"; that "Carbide breached no duty that it owed to Goett"; and that judgment therefore should have been entered in favor of the defendant.

The Court of Appeals expressly stated that its decision, summarized above, "makes it unnecessary to pass on the other questions raised by the several parties." Accordingly, the Court's opinion does not purport to deal with the questions of Goett's assumption of risk or contributory negligence, or with the question of Carbide's claim for indemnity from Amherst, and those questions are not set forth in the petition for certiorari in this Court.

V.

Summary of Argument

1. The maritime law does not provide a remedy for wrongful death. Thus, no action can be maintained in the Courts of the United States to recover damages for wrongful death on the high seas, or on inland navigable waters, in the absence of an act of Congress, or a statute of a state, giving a right of action therefor. There is no act of Congress giving such a right with respect to Goett's death in this case. Therefore, the only right of action in this case is that arising under the Wrongful Death Act of West Virginia.

2. Where death results from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by a wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such

right is given; but where admiralty adopts a state wrongful death statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which the state statute makes a part of its existence.

3. The West Virginia Wrongful Death Act created a new cause of action for the benefit of certain beneficiaries named therein, and does not perpetuate a cause of action which the deceased may have had before his death. The West Virginia statute's limitation upon the amount of recovery for wrongful death is a part of the substantive right created by the Act. Therefore, where, as in this case, the West Virginia Wrongful Death Act is adopted as a basis for recovery, the admiralty court must enforce and apply the provisions of that Act which limit the maximum amourt of recovery in such actions.

4. The West Virginia Wrongful Death Act does not afford a remedy for unseaworthiness of a vessel and does not recognize any species of liability without fault. Furthermore, at the time of his death Goett was not "doing a seaman's work", and was not a person within the application of the doctrine of recovery for "unseaworthiness."

5. The barge was not "unseaworthy", and Carbide was not required to furnish or equip it with life rings, buoys, railings or stanchion lines, or other life saving equipment, the absence of which is complained of by the petitioner.

6. Any recovery in this case must be based on negligence on the part of Carbide. Carbide was not negligent in failing to furnish or mount life rings, buoys, railings or stanchion lines on the barge, or in failing to provide other life saving equipment, the absence of which is com-

plained of by the petitioner; but if Carbide was negligent in any such respect, Goett was guilty of contributory negligence, which bars recovery in this case. The doctrine of contributory negligence, as an absolute bar to recovery, is a part of the substantive law of West Virginia applicable to actions for wrongful death, and as such it is applicable to this case based on the West Virginia Wrongful Death Act. Likewise, if Carbide was negligent, recovery is nevertheless barred because Goett assumed the risk that caused his death; and the doctrine of assumption of risk also being a part of the substantive law of West Virginia, applicable to actions for wrongful death, it is applicable in this case. The District Court clearly erred in failing to find, as a matter of law, that Goett was guilty of contributory negligence, and that he assumed the risk that caused his death.

7. The Court of Appeals did not reach or decide any of the questions that might otherwise arise on Carbide's third-party complaint, asserting a right to indemnity against Amherst, and none of such questions are presented by the petition for certiorari. However, should this Court reverse the decision of the Court of Appeals, and hold that Petitioner is entitled to recover against Carbide, then Carbide's claim for indemnity against Amherst will of course become pertinent, and Amherst is in doubt as to whether or not this Court might, in such event, consider and decide Carbide's claim for indemnity against it. Accordingly, the position of Amherst with respect to such claim for indemnity will be set forth and discussed in this brief. With respect to the question of indemnity, Amherst asserts that its barge repair contract with Carbide does not, by its terms, bind Amherst to indemnify Carbide under any circumstances; and certainly can not be construed as binding Amherst to

indemnify Carbide for liability resulting either in whole or in part from Carbide's own fault or negligence. Therefore, Carbide's claim has no basis in any express contract of indemnity.

Any claim by Carbide to recover from Amherst must rest upon contractual right; and, since there is no express promise of indemnity, there can be no contractual right of indemnity unless such a promise can be implied from the facts and circumstances of the case; and no such contract of indemnity can be implied from the facts and circumstances here.

The District Court found that Amherst was not guilty of any negligence and had not breached any duty owed by it. That finding must stand unless clearly erroneous. Since Amherst was not negligent, and breached no duty owed by it, no contract to indemnify Carbide for liability, if any, arising from Goett's death, can be implied. Even if it should be found, contrary to the finding of the District Court, that Amherst was guilty of negligence that proximately contributed to Goett's death, still no promise to indemnify Carbide for any liability on its part should be implied; for, if Carbide is liable for Goett's death, such liability can be predicated only on its own failure to furnish and equip its barge with life saving equipment, and therefore arises out of a risk or danger created by it; whereas negligence, if any, on the part of Amherst, could, consist only of failing to remedy or take precautions against any conditions or defects created by Carbide. Amherst did not contract to remedy patent defects or dangers created by Carbide, and no contract to indemnify Carbide against the consequences of risks of its own creation, should be implied. A contract of indemnity will be implied in such cases, only where the owner of the vessel is made liable, by action of law, for

a defect or danger created by the contractor, without any actual fault or neglect of the owner; and this is not such a case. Therefore, even if Carbide is held liable, it should have no right of indemnity against Amherst.

VI.

Argument

1. The Maritime Law Does Not Allow Recovery For Wrongful Death, Independently Of A Federal Or State Statute Creating Such Right of Action.

In *The Harrisburg* (1886) 119 U. S. 199, it was held that, "by the common law no civil action lies for an injury which results in death," and that since "the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched", no action at law can be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable therefrom, caused by negligence, in the absence of an act of Congress, or a statute of a state, giving a right of action therefor. This rule has been affirmed in many subsequent decisions, down to the present, including: *Butler* vs. *Boston & Savannah S. S. Co.* (1888), 130 U. S. 527; *Deslions* vs. *Compagnie Generale Transatlantique* (1908), 210 U. S. 95; *Western Fuel Co.* vs. *Garcia* (1921), 257 U. S. 233; *Lindgren* vs. *U. S.* (1930), 281 U. S. 38; *Just* vs. *Chambers* (1940), 312 U. S. 383; *Levinson* vs. *Deupree* (1952), 345 U. S. 648; *Kernan* vs. *American Dredging Co.* (1958), 355 U. S. 426; *The Tungus* vs. *Skovgaard* (1959), 358 U. S. 588.

The Petitioner says that the Court "erred" in *The Harrisburg*, in its holding that the maritime law historically left the common law rule untouched. We submit, however, that whether the Court in *The Harrisburg* was

correct or incorrect in its interpretation of ancient maritime precedents, the rule of that case has long since become a part of the maritime law, as accepted by the United States, and ought not now to be changed upon the assumption that *The Harrisburg* misconceived the ancient maritime law, existing before the development of a body of maritime law in this country.

In *Butler* vs. *Boston & Savannah S. S. Co.*, supra, the Court said that the maritime law itself "is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted." While the "law of the sea" is in a peculiar sense an international law, its specific rules, to be applied in our courts, are those which have been accepted by the United States. *Lauritzen* vs. *Larsen* (1952) 345 U. S. 571. Through long acceptance, the rule of *The Harrisburg* has become the maritime law of the United States. *The Tungus* vs. *Skovgaard*, supra.

The petitioner says that the rule of *The Harrisburg* "cannot be socially or morally defended", and that this Court should now "declare and effectuate" a contrary rule "in the light of fundamentally altered conditions." While it is true that the common law rule has long been widely criticized, we submit that it has become well established that its alleviation, where deemed necessary, should be approached by legislative action, and not by judicial abrogation. Congress has considered and dealt with the effect of the maritime law, and the manner and extent of its proper alleviation, in the Death On The High Seas Act, 46 U.S.C.A. 761, et seq., and the Jones Act, 46 U.S.C.A. 688. The legislatures of nearly all of the states have enacted statutes substantially embodying the provisions of Lord Campbell's Act, in so far as the right to maintain an action for wrongful death is concerned, and

this Court had held that "where death upon such waters results from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the admiralty Courts will entertain a libel in personam for the damages sustained by those to whom such right is given." *Western Fuel Co.* vs. *Garcia*, supra; *Levinson* vs. *Deupree*, supra. We respectfully submit that this long and carefully developed state of the law ought not to be destroyed, or substantially altered, except by further Congressional action.

2. Where Admiralty Adopts a State Wrongful Death Statute As a Rule of Right To Be Administered Within Its Own Jurisdiction, It Must Take The Right Subject To The Limitations Which Have Been Made a Part Of Its Existence.

In *The Harrisburg*, supra, the Court said that "it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence." Accordingly, it was held in that case, and also in *Western Fuel Co.* vs. *Garcia*, supra, that the time limitations fixed by state wrongful death statutes operate as a limitation of the liability itself as created, and must be applied in admiralty suits based on such statutes.[1] By like reasoning it was held in *Levinson* vs. *Deupree*, supra, that where the state statute vests the right of action in decedent's personal representative, "it is not for the forum provided by another jurisdiction to vest the right elsewhere." In *Garrett* vs. *Moore-McCormack Co.* 317 U. S. 239, 245, it was stated that: "Admiralty courts when invoked to pro-

[1] See also: *Continental Casualty Co. vs. The Benny Skou* (CCA 4 1952) 200 F. 2d 246.

tect rights rooted in state law endeavor to determine the issues in accordance with the substantive law of the state." This rule was recently approved in *The Tungus* vs. *Skovgaard*, supra.[2]

It follows from the principle referred to, that where, as in this case, the West Virginia Wrongful Death Act is adopted as a basis of recovery, the admiralty courts must enforce and apply the provisions of that statute, which limit the maximum amount of recovery in such actions to $20,000. Such a limitation is a "limitation of the liability itself as created", in the same manner and to the same extent as the limitations on the time for bringing such a suit, or the limitations restricting the right to sue to the personal representative, which, it was held in *The Harrisburg*, supra, and *Levinson* vs. *Deupree*, must be applied and enforced.[3]

The West Virginia statute's limitation upon the amount of recovery is a part of the substantive right created by the Act. The statute does not revive the decedent's cause of action but creates an entirely new cause of action, and the limitations imposed by the statute are "an essential restraining element of the right of action given." *Lambert* vs. *Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431; *Dunsmore* vs. *Hartman*, 140 W. Va. 357, 84 S. E. 2d 137. The West Virginia statute, W. Va. Code, Chapter 55, Article 7, Section 8, permits the survival of a cause of action accrued prior to the decedent's death, only if an action was commenced before death, in which event the pending action is conformed to the statutory action for wrongful death. *Alloy* vs. *Hennis Freight Lines*, 139 W. Va. 480, 80 S. E. 2d 514.

[2] See also: *Niepert vs. Cleveland Electric Illuminating Co.* (CCA 6) 241 F. 2d 916, cert. den. 354 U. S. 909; *Curtis vs. A. Garcia y Cia* (CCA 3) 241 F. 2d 30.

[3] See: *Quinnette vs. Bisso* (CCA 5) 136 F. 825.

Petitioner's argument that application of the particular limitations of the West Virginia statute, to limit the amount of recovery in admiralty suits based on that statute, is "contrary to the avowed policy of the admiralty jurisdiction to insure harmony and uniformity in the essential characteristics of the maritime law", has already been considered and rejected by this Court. *Western Fuel Company* vs. *Garcia*, supra, *The Tungus* vs. *Skovgaard*, supra.

If the limitations which are a part of the right created by the West Virginia statute, could not be accepted by the admiralty courts, the end result would be to exclude altogether the application of the state statute in such courts; for the admiralty courts could not reasonably look to the state statute for a right of action not given by maritime law, and then, in effect, rewrite the state statute to "harmonize" with "maritime law" or "admiralty policy." *Garrett* vs. *Moore-McCormack Co.*, supra; *The Tungus* vs. *Skovgaard*, supra.

The District Court was therefore correct in its ruling that any recovery in this action is limited to the $20,000 maximum permitted by the West Virginia Wrongful Death Act.

3. The West Virginia Wrongful Death Act Does Not Permit Recovery Based Upon Unseaworthiness.

The Circuit Court of Appeals noted that "there is a division of opinion whether a suit under a statute like the West Virginia Wrongful Death Act can be based on unseaworthiness", and stated that it was not necessary to decide "whether a suit in admiralty under the West Virginia Act can ever be based on unseaworthiness, because Goett was not a person to whom the warranty of seaworthiness ran, and because we do not agree with the

finding of the District judge that the barge was unseaworthy." Thus, unlike *The Tungus* vs. *Skovgaard*, supra, there is no determination by the Court of Appeals here, that a claim for unseaworthiness is encompassed by the West Virginia Act as a matter of state law.

While we agree with the Court of Appeals, that for the reasons stated by it, it is unnecessary to decide the question in this case, we nevertheless submit that the West Virginia Act does not encompass a claim based upon unseaworthiness alone.

As we understand it, the doctrine of unseaworthiness comprehends a species of liability without negligence, based upon an implied warranty. The West Virginia Wrongful Death Act does not permit the imposition of liability without fault; and does not permit recovery *ex contractu* and no recovery can be had against a party thereunder, in such an action as this, without proof of negligence. *Osborne* vs. *Chesapeake & Potomac Telephone Co.*, 121 W. Va. 357, 3 S. E. 2d 527; *Jones* vs. *Rinehart & Dennis Co.*, 113 W. Va. 414, 168 S. E. 482; *State ex rel Yost* vs. *Scouszzio*, 126 W. Va. 135, 27 S. E. 2d 451; *Gilkerson* vs. *B. & O. R. Co.*, 129 W. Va. 649, 659, 41 S. E. 2d 188. Thus, there can be no recovery against Carbide in this case without sufficient proof of actual negligence on its part. Liability can not be predicated against Carbide, under the West Virginia Act, upon the theory that Carbide is liable, without any actual negligence, for the breach of a non delegable duty of seaworthiness. *Lee* vs. *Pure Oil Co.*, (CCA 6) 218 F. 2d 711; *Graham* vs. *A. Lusi*, (CCA 5) 206 F. 2d 223.

4. Goett Was Not A Person To Whom The Warranty of Seaworthiness Ran.

Assuming, *arguendo*, that a claim based upon seaworthiness could be encompassed by the West Virginia

Act, it is submitted that the Court of Appeals was correct in holding that "Goett was not a person to whom the warranty of seaworthiness ran."

The doctrine of recovery for unseaworthiness, as this Court recently pointed out in *Pilots Association* vs. *Halecki*, 358 U. S. 613, defines a duty "which the owner of a vessel owes to the members of the crew who man her." The justification or reason for the rule is noted therein. While the application of the rule has been extended to other persons, not members of the crew, who are performing work "traditionally done by members of the crew", it has not been so far extended as to include all persons who may be engaged in work upon the vessel, regardless of the nature of such work or the circumstances of its performance.

In its normal operation on the river, the barge in this case had no crew. It was, as stated by the Court of Appeals, an unmanned vessel. At the time of the accident in this case the barge had been turned over by Carbide to Amherst for major repairs, including sandblasting and painting of the entire hull, and the installation of "Butterworth hatches." The repairs were such as required the barge to be removed from the water and "dry-docked" on Amherst's marine railway, although that had not yet been done at the time of Goett's death. It is clear that the very reason that the barge was turned over to Amherst was because the work to be done did not fall within the province of a crew. The barge was not in navigation at the time of Goett's death, nor was it ready for navigation. It was undergoing major repairs for the very purpose of assuring its continued seaworthiness. Under such circumstances, the Court of Appeals was correct in its holding that "the warranty of seaworthiness

does not apply in that situation." *Pilots Association* vs. *Halecki*, supra.

In *Halecki*, this Court noted its prior decisions in *Seas Shipping Co.* vs. *Sieracki*, 328 U. S. 85, and *Pope & Talbot* vs. *Hawn*, 346 U. S. 406, and distinguished them, saying:

> "Neither these decisions nor the policy that underlies them can justify extension of liability for unseaworthiness to the decedent in the present case. The work that he did was in no way 'the type of work' traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was 'dead' with its generators dismantled. Moreover, it was the work of a specialist, requiring special skill and special equipment—portable blowers, air hoses, gas masks, and tanks of carbon tetrachloride, all brought aboard the vessel for this purpose, and none connected with a ship's seagoing operations."

What was said there is equally applicable here. The work that Goett was doing could not be performed upon a barge ready for use on the river, but called for dry-docking, without which the sides and bottom of the barge would have been inaccessible. It was the work of specialists, requiring the skill of sandblasters and welders, and special equipment—portable air compressors, sandblasting hoses and nozzles, protective hoods and respirators, all brought aboard the barge for the particular purpose of the work in progress. The work was of such a nature that it could only be performed when the barge was laid up, and out of its customary operation by Carbide.

Seas Shipping Co. vs. *Sieracki*, supra; *Pope & Talbot* vs. *Hawn*, supra, *Alaska Steamship Co.* vs. *Petterson*, 347

U. S. 396; *Rogers* vs. *United States Lines*, 347 U. S. 984,[4] and *The Tungus* vs. *Skovgaard*, supra, all involved situations in which the work performed was incident to loading or unloading of the vessel as an incident to a voyage. No such function is involved here.

It is respectfully submitted that Goett's status was not that of a seaman, and that it is not proper to speak of the absence of life saving equipment, such as is complained of as the basis of recovery here, as constituting "unseaworthiness" with respect to him.

5. The Barge Was Not Unseaworthy.

Assuming, *arguendo*, that a claim based on unseaworthiness can be maintained under the West Virginia Wrongful Death Act, and assuming that Goett was within the application of that doctrine, still the Court of Appeals was correct in its further holding that the barge was not unseaworthy. The Court said: (R. p. 249):

> "The barge was not unseaworthy. In its ordinary operation, it was unmanned, and did not require life saving equipment. It did not become unseaworthy when men went aboard after it had been turned over to a repair yard under the circumstances of this case. *Lester* vs. *United States*, 2 Cir., 234 F. 2d 625, cert. den. 352 U. S. 889."

This view is warranted by the law and the evidence. The warranty of seaworthiness is not a warranty that the vessel, its gear or equipment is absolutely safe as against all contingencies or for all purposes. *Boudoin* vs. *Lykes*

[4] Per curiam decision, reversing 205 F. 2d 57 (CCA 3).

[5] *Raidy vs. United States* (CCA 4) 252 F. 2d 117, cert. den. 356 U. S. 973, *Berryhill vs. Pacific* (CCA 9) 238 F. 2d 385, cert. den. 354 U. S. 938; *West vs. United States* (CCA 3) 256 F. 2d 671, cert. granted, and now pending in this Court; *Berge vs. National Bulk Carriers* (CCA 2) 251 F. 2d 717, cert. den., 356 U. S. 958.

Bros. S. S. Co., 348 U. S. 336. This barge, as operated and maintained by Carbide, was intended for operation in tows on the river. As such, it was unmanned. There is no evidence that the operation of the barge in such a manner reasonably required the mounting of railings, stanchion lines, life rings or buoys, as necessary to establish its seaworthiness. On the contrary, the evidence is that it was not normal or customary for such barges to be so furnished or equipped (R. pp. 138-139). Even petitioner's own "expert" testified that it is not reasonable or practical for a barge to carry such equipment in normal operation (R. p. 123), and that it is not customary for such barges to do so (R. p. 124). The barge and its equipment had been certified, inspected and approved by the Coast Guard (R. p. 217). Applicable Coast Guard Regulations do not require that such barges be equipped with the devices, the absence of which is alleged to have rendered it unseaworthy (R. p. 136). It is therefore submitted that the District Court was clearly wrong in finding the barge unseaworthy, and the Court of Appeals was correct in holding that it was not unseaworthy.

6. Carbide Was Not Guilty of Negligence.

For the reasons hereinbefore stated, the Petitioner's right to recover in this case must depend upon the question whether or not Carbide was negligent. That question must be determined in accordance with the substantive law of West Virginia. *Garrett* vs. *Moore-McCormack*, supra; *The Tungus* vs. *Skovgaard*, supra. It is submitted that, when so tested, the evidence shows that the Court of Appeals was correct in its holding that Carbide was not negligent.

To constitute actionable negligence there must be a breach of some duty owed to the person who is injured: *Uthermohlen* vs. *Bogg's Run Company*, 50 W. Va. 457,

40 S. E. 410. Under West Virginia law, a property owner owes to an independent contractor, going on his property to perform work, only the duty of correcting or pointing out such latent defects or dangers as may not be known to the contractor and his employees. *Sesler* vs. *Rolfe Coal & Coke Co.*, 51 W. Va. 318, 41 S. E. 216.

It is not contended in this case that any of the conditions which allegedly lead to Goett's death, constituted latent defects or hazards. On the contrary, all of the things alleged to be defects or dangers were patent in character, and fully as discernible by Amherst, and by Goett, as by Carbide.

In *Lynch* vs. *United States* (CAA 2) 163 F. 2d 97, 99, Judge Learned Hand stated in a concurring opinion:

> "The duty (of a shipowner to employees of an independent contractor) is therefore only to advise them of any known dangers, or any that would have been discovered by reasonable care. This duty if sometimes put as though it was the same as providing a safe place to work, but, strictly speaking, that is not true. The shipowner is not responsible for giving them a safe place to work; all he need do is to discover any dangers and tell them."

Under the circumstances of this case, it would not be reasonable to say that Carbide was negligent simply because it did not point out to Goett the perfectly obvious fact that there were no railings, stanchion lines, life rings or buoys on the barge.

7. If Carbide Was Negligent, Recovery Is Barred By Goett's Assumption Of Risk And Contributory Negligence.

Assumption of risk and contributory negligence are absolute bars to recovery under the West Virginia Wrongful Death Act. *Barr* vs. *Curry*, 137 W. Va. 364, 71

S. E. 2d 313; *McKelvey* vs. *C. & O. Ry. Co.*, 35 W. Va. 500, 65 S. E. 334. The District Court correctly ruled that such defenses are available to the respondents, as a part of the substantive law of West Virginia. *Garrett* vs. *Moore-McCormack*, supra; *The Tungus* vs. *Skovgaard*, supra.* The District Court found, however, that "under the circumstances of this case Goett did not assume the risk of the danger which caused his death." In support of that view, the District Court said: (R. pp. 196-197)

> "I think it is not necessary to decide whether he did or did not assume the risk of falling over the side of the boat. It was not the fall that caused his death. The cause of his death, as I have found in my findings of fact, was the failure of Union Carbide and Carbon Corporation to have available rescue equipment, and that is a risk which I conclude Goett did not assume."

We submit that the risk of falling overboard, and the risk of drowning because of a lack of rescue equipment, were inseparable and correlative, and that, in any event, Goett clearly assumed all of the risks that were involved in his death.

The doctrine of assumption of risk in West Virginia rests on two premises: first, that the nature and extent of the risk are fully appreciated; and second, that it is voluntarily incurred. *Hunn* vs. *Windsor Hotel*, 119 W. Va. 215, 193 S. E. 57. The evidence shows that both the risk of falling overboard and the accompanying risk of drowning

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* See also: *Niepert vs. Cleveland Electric Illuminating Co.* (CCA 6) 241 F. 2d 916, cert. den. 354 U. S. 909; *Quinnette vs. Bisso* (CCA 5) 136 F. 825; *Hartford Acc. & Ind. Co. vs. Gulf Refining Co.* (CCA 5) 230 F. 2d 346; *Graham vs. A. Lusi, Ltd.* (CCA 5) 206 F. 2d 223; *Curtis vs. A. Garcia y Cia* (CCA 3) 241 F 2d 30.

Elsewhere in its findings, however, the District Court, in defining Carbide's supposed breach of duty, stated (R. p. 196): "* * I am thinking in that connection of measures such as life lines or stanchions, as they are called, to prevent falling off the unprotected deck; * *."

through a lack of available rescue equipment, were so obvious that they could not have escaped Goett's full knowledge. He had been engaged in similar work for Amherst for months, and had been working on the deck of the CC-204 for a day and a half before his death. The situation of the barge, and all of the conditions upon the barge were apparent almost at a glance. Goett could not have worked on the barge for even a few minutes without being aware that the barge was afloat on the river; that there was no railing around its decks; that there were no life rings or buoys on the barge; that there were no lines or other rescue equipment aboard; that a fall from the barge into the river was possible; and that a person who could not swim might drown, if he fell in the river.

Under these circumstances, the evidence requires a finding that Goett was aware of the risks, and being aware of them, he must necessarily have appreciated the danger manifestly inherent in them. The dangers were so obvious as to preclude an inference that Goett was unaware of them. *Delaware L. & W. R. Co.* vs. *Koske*, 279 U. S. 7; *Jacobs* vs. *Southern Ry. Co.*, 241 U. S. 229.

In *Childress* vs. *Ry. Co.*, 111 W. Va. 92, 160 S. E. 564, it was held that:

> "Ordinary risks of an occupation are assumed by an employee whether he is actually aware of them or not; and a risk not naturally incident to the occupation is also assumed; where the employee knows of it and appreciates the danger, or where the risk and the danger are so obvious as to preclude the inference that he was unaware of them."

In *Purkey* vs. *Southern Coal Co.*, 57 W. Va. 595, 50 S. E. 755, it was said:

See also: *Seaboard Ry. vs. Horton*, 233 U. S. 492; *Blackley vs. Powell*, (CCA 4) 68 F. 2d 457.

> "The plaintiff claims that the defendant failed to furnish him a safe place to work, but, whether this be so or not, the plaintiff knew of the danger which he says rendered the place unsafe, and, knowing of the danger, voluntarily encountered it, and having done so, he is charged with having assumed the extra hazard, and for that reason, cannot recover. It is the master's duty to furnish his servants a safe place, and when the servant enters the employment of the master, he may presume that the master has done so; but this is only a presumption, and when it is apparent to the servant that the place is unsafe, and he then continues in the employment, he thereby assumes the additional risk."

It is not material that Goett's employer directed him to work on the barge. In *Farley* vs. *Ry. Co.*, 67 W. Va. 350, 67 S. E. 1116, the Court held that:

> "One is not bound to assume the risk of a known danger because he is directed to do so by another; he must think and act for himself; and if he relies upon another's judgment and does an act contrary to his own sense of prudence, he is negligent."

Pritchard vs. *City Lines of W. Va.*, 136 W. Va. 278, 284, 66 S. E. 2d 276, is in accord with that view.

It is therefore submitted that the District Court was clearly wrong in its finding that Goett had not assumed the risk that resulted in his death. The Court of Appeals did not deem it necessary to pass on that question.

Under West Virginia law, the defense of contributory negligence is distinct from that of assumption of risk;

See also: *Laverty vs. Hambrick*, 61 W. Va. 687, 57 S. E. 240; *Williams vs. Coal & Coke Co.*, 55 W. Va. 84, 46 S. E. 802; *Oliver vs. Ohio River R. Co.*, 42 W. Va. 703, 26 S.E. 444; *Woodell vs. W. Va. Imp. Co.*, 38 W. Va. 23, 49-50, 17 S. E. 386; *State ex rel Cashman vs. Sims*, 130 W. Va. 430, 446, 43 S. E. 2d 805.

it being said that "the essence of contributory negligence is carelessness; of assumption of risk, venturousness." *Hunn* vs. *Windsor Hotel*, supra.

One minute before he was discovered in the water, Goett was seen by the witness, Goodwin, within three feet or less of the outboard edge of the barge. Despite his proximity to the edge of the barge, he was facing inboard, with his back to the river, thus depriving himself of such opportunity to observe his proximity to the edge of the deck as the protective hood he was wearing would otherwise have permitted. In addition, he was walking backward. About one minute later he was seen in the river. These undisputed facts require a conclusion that Goett was not keeping a proper lookout for his own safety, and simply backed over the edge of the barge.

One who works in surroundings known to be hazardous must maintain watchfulness appropriate to the hazards, and cannot recover for an injury resulting from inattention to his surroundings. Thus, in *Jones* vs. *Railway Co.*, 74 W. Va. 666, 83 S. E. 54, it was held that a railway yard employee who stepped into the path of a moving train, could not recover, regardless of his employer's negligence. The law charges a person with a duty to see that which is plainly to be seen. *Craft* vs. *Fordson Coal Co.*, 114 W. Va. 295, 171 S. E. 886. Even where an employee's work is rendered hazardous by defective or inadequate equipment and appliances, he is guilty of contributory negligence if he increases the hazard by performing his work in an unnecessarily dangerous manner. *Robinson* vs. *Coal Co.*, 78 W. Va. 94, 88 S. E. 620.

In *Priddy* vs. *Coal Co.*, 64 W. Va. 242, 61 S. E. 163, a coal miner was injured while pushing a coal car across a trestle from which the employer had removed certain

planks in the course of repairs. The removal of the planks created a hole in the platform over which the plaintiff was pushing the cars. Although plaintiff denied that he knew of the hole, the evidence showed that he had pushed a number of cars over it prior to the accident. The Court held that the evidence required an inference that plaintiff knew of the hole, and that his falling into it constituted "contributory negligence", as a matter of law. The Court said:

> "* * * We must therefore say, if human evidence can reasonably establish anything, that Priddy not only could and should have known of this hole in the platform, but in fact did know of it and therefore we must apply the law * * * holding that, 'When an employee wilfully encounters danger known to him, or patent and open to be seen and known, he cannot recover damages from his employer for injury therefrom. * * * 'Where the servant has equal knowledge with the master of the danger incident to the work, he takes the risk upon himself, if he goes on without.' * * *
>
> "Though a master is bound to give his servant a safe place to work, still if the servant know, or should know, of a patent danger he cannot recover because the law is that where both the master and the servant are negligent there can be no recovery. *Overby* vs. *C. & O. Ry. Co.*, 37 W. Va. 524. * * *"

It is accordingly submitted that recovery in this case is barred by contributory negligence and that the District Court clearly erred in failing to so find. It not being necessary to its decision, the Court of Appeals likewise declined to pass upon this question.

Holley vs. *The Manfred Stansfield*, (CCA 4) 269 F. 2d 317, does not require a contrary conclusion. In that case the Court held that under the Virginia Wrongful Death Act, the maritime rule of comparative negligence ap-

plied where the injury resulting in death occurred on navigable waters of the state. We respectfully submit that, if given the interpretation given it in petitioner's brief, the decision in *The Manfred Stansfield*, supra, is in conflict with the principle established in *The Harrisburg*, *Western Fuel Co.* vs. *Garcia* and *The Tungus* vs. *Skovgaard*, supra; and that it is hardly to be supposed that any state has not intended to establish uniform legal standards governing actions under its Wrongful Death Act, so that all cases will be treated alike, whether arising on land or water. However that may be, we further submit that it does not follow from the interpretation of the Virginia Act, in *The Manfred Stansfield*, that either the Court of Appeals or the West Virginia Courts would so interpret the West Virginia Act.

In *The Manfred Stansfield*, the Court relied heavily upon the fact that the Virginia statute "specifically covers * * 'wrongful acts or defaults of any ship or vessel' and speaks of the right 'to proceed *in rem* against the ship or vessel'—a procedure available only in admiralty." The Court also noted that Virginia is a state "with considerable maritime business", and that the Virginia Act was drafted "by one well versed in admiralty law", with particular reference to maritime cases. None of these things are true with respect to the West Virginia Act. Moreover, the *Manfred Stansfield* was a libel *in rem* against a vessel, as well as the owner, for which the Virginia act specifically provides, but the West Virginia act does not.

Petitioner argues that the West Virginia Act "follows" the Virginia Act; but in the respects particularly noted and relied upon by the Court of Appeals, in *The Manfred Stansfield*, the West Virginia Act does not "follow" the Virginia Act. If, as the Court of Appeals said in *The*

Manfred Stansfield, the reference of the Virginia statute to "wrongful acts or defaults of any ship or vessel", is persuasive that it intended to apply maritime rules to deaths on navigable waters, then the fact that West Virginia saw fit to omit any such references in its Wrongful Death Act, is equally persuasive that West Virginia did not intend to permit the application of maritime rules under its Act.

The Circuit Court of Appeals in this case expressly refrained from deciding whether or not, under the West Virginia Act, assumption of risk or contributory negligence are a bar to recovery. The District Court held that they are.

8. If Carbide Is Liable, It Is Not Entitled to Indemnity From Amherst.

Even if it should be held that Petitioner is entitled to recover from Carbide in this case, Carbide is not entitled to recover on its third party complaint seeking indemnity from Amherst. The District Court denied recovery on the third party complaint; and the Court of Appeals did not reach that question.

The District Court found that, "no negligent act of the third party defendant (Amherst) contributed proximately to cause the death of Mr. Goett." (R. p. 237). The Court of Appeals did not reach or pass upon that finding. It must stand unless clearly erroneous. *McAllister* vs. *United States*, 348 U. S. 19. However, even if it be assumed that Amherst and Carbide were both negligent, Carbide can not recover from Amherst on any theory of contribution. *Halcyon Lines* vs. *Haenn*, 342 U. S. 282; and Carbide can have no right of indemnity against Amherst, except upon proof of a contractual right.[10]

[10] See: *Brown vs. American-Hawaiian S S. Co.* (CCA 3) 211 F. 2d 16.

Carbide relies upon two provisions of its "purchase order" contract for the repair of the barge, as giving rise to an express right of indemnity. The first of these provisions reads as follows:

> "INSTALLATION: In the event that any articles ordered hereunder require, in connection with the installation thereof, the services of a supervisor, expert, or other employee connected with or employed by Seller (Amherst), and Seller (Amherst) agrees to furnish the same, either with or without charge, such supervisor, expert or other employee in performing such service shall not be deemed to be the agent or employee of Buyer (Carbide), and Seller (Amherst) assumes full responsibility for his acts and omissions and exclusive liability for any payroll taxes or contributions imposed by any federal or state law dealing with any of the subjects covered by the Federal Social Security Act approved August 14, 1935."

It is submitted that this provision can not be construed as a promise to indemnify Carbide. It is to be noted that the "purchase order" was a form contract prepared by Carbide for use in a multitude of varying transactions, and was not designed with particular application to the specific barge repair job here in question. The above quoted "Installation" provision was clearly not intended to provide for indemnity, but was intended to avoid the possibility that a contractor's employees might, in some circumstances, be construed to be employees of Carbide, thus subjecting the latter to possible liability for wages, payroll taxes, or workmen's and unemployment compensation contributions, or possible liability to third persons based upon the doctrine of *respondeat superior*.

Moreover, the words "Seller assumes full responsibility for *his* acts and omissions", refers to acts and omissions of "a supervisor, expert, or other employee con-

nected with or employed by *Seller*", and can not be construed as binding Amherst to assume responsibility for "acts and omissions" of Carbide.

If Carbide is to be held liable in this case, it must be on account of some negligent act or omission of its own; and since the plain language of the "Installation" clause of the contract does not purport to make Amherst "responsible" for negligent acts or omissions of Carbide, but only for those of "a supervisor, expert, or other employee connected with or employed by Seller (Amherst)", the "Installation" clause furnishes no basis for Carbide's claim to indemnity.

The second provision of the purchase order, relied upon by Carbide as a basis of its claim for indemnity, is as follows:

> "INSURANCE: If this agreement provides for work to be performed by Seller (Amherst Barge Company) on property owned or controlled by Buyer (Union Carbide & Carbon Corporation), or on property of others named herein, Seller shall insure to each of its employees engaged upon the work the compensation provided for by, and shall strictly comply with, each and every statute applicable thereto with respect to Workmen's Compensation and or Employer's Liability and shall procure and maintain, at the cost and expense of the Seller, until final acceptance of the work by the Buyer, Public Liability Insurance in a reputable and financially responsible insurance company, properly safeguarding the Seller against liability for injuries to persons, including injuries resulting in death, in amounts acceptable to the Buyer, and shall furnish to Buyer written certificates from insurance carries or from appropriate Governmental authorities establishing that said insurance of employees and said Public Liability

> Insurance have been procured and are being properly maintained, and that the premiums therefor are paid, and specifying the names of the insurers and the respective policy numbers and expiration dates. All such insurance policies shall provide (unless by statute applicable thereto it is otherwise provided) that in the event of cancellation thereof, written notice of such cancellation shall be effective date of such cancellation."

This provision, upon its face, and by its plain terms, does nothing more than require Amherst to comply with applicable compensation statutes protecting its employees, and to maintain public liability insurance "properly safeguarding the Seller (Amherst) against liability." These requirements were fully complied with by Amherst. The "Insurance" clause does not purport to bind Amherst to indemnify Carbide under any circumstances.

Carbide's claim for indemnity must be determined in accordance with the substantive law of West Virginia. Under West Virginia law, a contract will not be construed as undertaking to indemnify another for the consequences of his own negligence, in the absence of a clear expression of such intent. In *Washington & Berkeley Bridge Co.* vs. *Pennsylvania Steel Co.*, (CCA 4) 215 F. 2d 32, 34, a case arising under West Virginia law, it was said that: "The presumption is exceedingly strong against an undertaking by anyone except an indemnity company to be responsible for the negligent acts of another." Also, this purchase order was a form contract prepared by Carbide, and any uncertainties that might arise as to its meaning must be resolved against Carbide. *Price* vs. *Stonega Coke & Coal Co.*, 26 F. Supp. 172, modified, 106 F. 2d 411, cert. den., 308 U. S. 618. Certainly it cannot be construed as binding Amherst to indemnify

Carbide for liability resulting from Carbide's own negligence.

We submit that the construction properly to be given to the "Insurance" provision of the purchase order, is that given to a like provision in *Weldon* vs. *U. S.* (CCA 1) 65 F. 2d 748. In that case, an employee of a stevedore company sued for an injury caused by the breaking of a ladder on a vessel owned by the United States. The latter appealed from an order denying its motion to implead and recover indemnity from the stevedore company, based upon a contract which provided:

> "13. The stevedore shall at its own cost and expense carry the following insurance protection:
>
> (a) Liability arising under Workmen's Compensation laws of the state in which the stevedoring is performed for injury to or death of employees and also liability arising under the provisions of the Act of Congress approved March 4, 1927, entitled 'Longshoremen's and Harbor Worker's Compensation Act.'
>
> (b) Employer's Liability for which the stevedore is legally liable to employees in the amount of $50,000, etc.
>
> (c) Liability to the public in the amount of $50,000."

In holding that these provisions did not give rise to any right of indemnity, the Court said:

> "* * * Giving the language of the contract its natural meaning, the phrase 'insurance protection', as therein used, refers to the protection of the stevedore. The liabilities to be covered are expressly stated. * * * The intent of the contract obviously is that the stevedore shall carry insurance to protect its obligations to its employees and to the general public, in case of accidents arising

> out of its work. If it had been intended that the stevedore should also carry insurance protecting the owner of the vessel against claims for negligence based on defects in its permanent structure, it cannot be doubted that the contract would have said so."

The West Virginia rule that a contract will not be construed as binding one party to indemnify another for his own negligence, in the absence of an unequivocal expression of such intent, is widely recognized in other jurisdictions. *Halliburton Oil Well Cementing Co.* vs. *Paulk* (CCA 5) 180 F. 2d 79; *Buckeye Cotton Oil Co.* vs. *Louisville & N. R. Co.* (CCA 6) 24 F. 2d 347; *Mostyn* vs. *Del. L. & W. R. Co.* (CCA 2) 160 F. 2d 15; *American Mutual Liability Ins. Co.* vs. *Matthews,* (CCA 2) 182 F. 2d 322.

This case is very different from *Porello* vs. *United States,* (CCA 2) 153 F. 2d 605. In that case, which was an action for personal injuries, arising under the Public Vessels Act, 46 U.S.C.A. Sec. 781, the "insurance" provision of the contract in question went much farther than the provision here. In addition to prescribing that the contractor should carry insurance protection against Longshoremen's Act liability, it expressly provided that: "The Stevedore * * * shall be responsible for any and all damage or injury to persons and cargo while loading or otherwise handling or stowing the same, * * * through the negligence or fault of the Stevedore, his employees and servants." The question raised there was whether this imposed upon the Stevedore, (1) liability for his own negligence alone; or, (2) entire liability for joint negligence of himself and the owner; or, (3) proportionate liability for the comparative negligence of himself and the owner.

The Court of Appeals, in *Porello,* did not say that the

mere contract of the stevedore, to carry insurance protecting its employees, constituted a promise to indemnify the owner; but that the further, express promise to "be responsible for any and all damage or injury * * * through the negligence or fault of the stevedore", should be construed as a promise to indemnify the owner for liability resulting either wholly or in part from negligence of the steyedore. The Court reached that conclusion by reasoning that the stevedore's agreement to carry "compensation insurance" forbade a construction that the subsequent indemnity clause intended to indemnify the owner for liability from negligence of the stevedore alone, because, having insured, the stevedore "would not be liable to the person injured", and it was therefore "reasonable to construe the clause to cover cases where in respect to the injured person both the contractor and the shipowner are at fault."

This Court, in reviewing the Court of Appeals decision, in *United States* v. *Porello,* 330 U. S. 446, stated that the contract clause was ambiguous, and remanded the case for a determination by the District Court as to the intent of the parties. Upon remand, the District Court adopted the interpretation of the Court of Appeals, 94 F. Supp. 952.

The instant purchase order contains no provisions such as that at issue in *Porello.* Nor has either the District Court or the Court of Appeals found any promise of indemnity in the language of the purchase order in this case. On the contrary, the District Court found that no right of indemnity exists; it being expressly stated that "the contract is not in any sense ambiguous." (R. p. 237).

Therefore the purchase order contract creates no express right of indemnity, and no such right exists, unless

it can be implied from the facts and circumstances of the case. We submit that no right of indemnity can be so implied here.

As previously noted, the District Court found that Amherst was not negligent. More specifically, the District Court found that Amherst was not guilty of failing to provide railings, stanchion lines or life saving equipment on the barge, and that it was Carbide's duty not Amherst's to provide such equipment. In the absence of negligence, i.e., a breach of duty, upon Amherst's part, there can be no implied contract to indemnify Carbide for any damages awarded against it. *United States* vs. *Harrison*, (CCA 9) 245 F. 2d 911.

Assuming, however, that the finding of the District Court, that Amherst breached no duty and was guilty of no negligence, should be set aside as clearly erroneous; Carbide would still not be entitled to indemnity against Amherst. Petitioner's recovery in this case cannot be predicated upon a finding that Amherst alone was negligent, but pre-supposes that Carbide was itself guilty of negligence. If so, then there is no right of indemnity because the law will not imply a contract to indemnify Carbide for liability arising from a patent hazard or defect, created by Carbide itself.

If Carbide is to be held liable in this case, it must be upon a finding that it was negligent in failing to equip its barge with railings, stanchion lines, life rings or buoys, or other life saving equipment. If Amherst was also negligent, its negligence could consist of nothing more than a failure to remedy or guard against such patent hazards or defects created by Carbide's supposed negligence. Amherst did not contract to remedy patent defects created by Carbide, and in the absence of an express promise to do so, such a contract can not be implied.

In *Ryan Stevedoring Co.* vs. *Pan Atlantic S. S. Corp.*, 350 U. S. 124, the plaintiff, a longshoreman, was employed by a stevedoring firm which had contracted with the shipowner to do all the work of both loading and unloading the vessel. When the vessel was loaded with a cargo of paper rolls, the stevedoring contractor negligently failed to place chocks or wedges under the rolls, thus *creating* the peril which later resulted in the plaintiff's injury. When the same stevedoring company subsequently unloaded the same paper rolls in a far distant port, the plaintiff employee was injured because the absence of chocks permitted one of the rolls to roll upon him. The fault of the shipowner consisted only in failing to correct the improper stowage condition created by the negligence of the stevedoring company.

The injured longshoreman sued the shipowner, who impleaded Ryan, seeking indemnity. The trial court denied indemnity. *Palazzolo* vs. *Pan Atlantic S. S. Corp.*, 111 F. Supp. 505. Upon appeal, the Court of Appeals for the Second Circuit reversed the judgment denying indemnity, upon the theory that indemnity is recoverable where the employer's negligence is the "sole", "primary" or "active" cause of the accident. 211 F. 2d 277.

The decision of the Court of Appeals was affirmed by an equally divided Court in a memorandum opinion, 349 U. S. 901; and was later reargued before a full Court and affirmed, four Justices dissenting. The opinion dealt with two questions: first, whether indemnity was barred by the Longshoremen's Act; and, second, whether, under the circumstances there presented, Ryan was liable in indemnity. In answering the first question in the negative, and the second in the affirmative, this Court relied solely upon the contract between the parties. It appears that indemnity was allowed because the Court reasoned

that since Ryan had expressly contracted "to perform all of the shipowner's stevedoring operations at the time and place where the cargo was loaded", and since its failure to perform that duty properly had created the hazard that caused the injury, it would be implied from the contract that Ryan agreed to hold the shipowner harmless for any breach of its promise to stow the cargo safely.

The doctrine of the *Ryan* case was again applied by this Court in *Weyerhaeuser S. S. Co.* vs. *Nacirema Operating Co.*, 355 U. S. 563. In that case the stevedoring contract obligated the stevedore "to faithfully furnish such stevedoring services as may be required," and to provide all necessary labor and supervision for the "proper and efficient conduct of the work." The services of the stevedore were to be rendered in the ports of New York and Boston. While the vessel was in New York the stevedore built a temporary wooden winch shelter on the deck. The shipowner failed to remove the shelter when the vessel left New York for Boston; and while the same stevedore was unloading the ship in Boston, the plaintiff was injured when a board fell out of the winch shelter and struck him while he was at work in the lower hold.

The injured plaintiff sued the owner of the vessel and the owner impleaded the stevedore, claiming indemnity. The plaintiff recovered judgment against the owner, but the trial court directed a verdict on the owner's claim to indemnity. The Court of Appeals affirmed (236 F. 2d 848), on grounds that the shipowner's "independent failure of duty" to remove the winch shelter when the vessel left New York, was not a "foreseeable" consequence of the building of the shelter by the stevedore, and that indemnity was precluded because the injury resulted from the "negligent act of the ship alone."

This Court reversed, holding that the owner was entitled to a jury trial on the question of indemnification. The Court said:

> "We believe that the respondent's contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo, as in *Ryan*, but also to the use of equipment incidental thereto, such as the winch shelter involved here. *American President Lines* vs. *Marine Terminals Corp.*, 234 F. 2d 753, 758; *United States* vs. *Arrow Stevedoring Co.*, 175 F. 2d 329, 331. If in that regard respondent rendered a substandard performance which foreseeingly led to petitioner's liability, the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*" (Italics ours)

The Court then pointed out that the jury's verdict finding the owner negligent as to the plaintiff, did not *ipso facto* preclude recovery of indemnity by the owner from the stevedore. The Court said:

> "While the jury found petitioner 'guilty of some act of negligence', that ultimate finding might have been predicated, *inter alia*, on a failure of petitioner to remove the shelter when the ship left New York, or a failure to correct or warn respondent of a latent dangerous condition known to petitioner when respondent began the Boston unloading. Likewise, the finding might have been predicated on a failure of petitioner during the five days in Boston to inspect the shelter, detect and correct the unsafe condition. Although any of these possibilities could provide Connolly a basis of recovery, at least the latter would not, under *Ryan*, prevent recovery by petitioner in the third party action. * * *"

It is to be noted that in both the *Ryan* and *Weyerhaeuser* cases, the contractor-employer *created* the dangerous condition, its fault preceded that of the ship-

owner in point of time, and the fault of the shipowner consisted only in failing to remedy a hazard created by the contractor-employer.

The situation here is just the reverse from that in *Ryan* and *Weyerhaeuser*. If Carbide was negligent in failing to equip its barge with safety and rescue equipment, then its negligence *created* the hazard, while Amherst's fault, if any there was, consisted only of a failure to remedy or correct that hazard. *Hagans* vs. *Farrell Lines* (CCA 3) 237 F. 2d 477.

In *Hawn* vs. *Pope & Talbot, Inc.* (CCA 3) 198 F. 2d 800, affirmed, 346 U. S. 406, a carpenter employed by a ship repair firm was injured when he fell through an open and unlighted hatch. He sued the owner, who impleaded the employer, claiming both contribution and indemnity. The jury found that the vessel was unseaworthy and that both owner and contractor were negligent; the owner, presumably in leaving the hatch covers off and failing to light the area, and the contractor in failing to protect its employees against such patent dangers. Judgment was entered for contribution by the contractor-employer, but reversed by the Court of Appeals on the authority of *Halcyon*, supra. The Court also denied the owner's claim to indemnity, saying:

> "The charterer (owner) again urges that it is entitled to indemnity from Haenn (contractor) and therefore that the Supreme Court opinion in Halcyon does not control. As we have above indicated that argument finds no support in the present situation where upon the facts proven the jury properly found that the charterer and the employer jointly caused the injury to Hawn."

See also: *Lo Bue* vs. *United States*, (CCA 2) 188 F. 2d 800; *Torres* vs. *The Kastor* (CCA 2) 227 F 2d 664; *Amerocean S. S. Co.* vs. *Copp*, (CCA 9) 245 F. 2d 291.

In *Union Stock Yards Co.* vs. *Chicago, etc. R. Co.*, 196 U. S. 217, it was pointed out that where several wrongdoers are involved, indemnity has been permitted to one against another, only where:

> "* * * the wrongful act of the one held finally liable *created* the unsafe or dangerous condition from which the injury resulted. * * * and the other has been held liable to third persons for failing to discover or correct the defect *caused* by the positive act of the other." (Italics ours)

In *American Mutual Liability Ins. Co.* vs. *Matthews*, supra, where a stevedore's employee was injured by the breaking of a guy rope on a winch, and the owner unsuccessfully sought indemnity from the contractor-employer, the Court said:

> "* * * In the case at bar no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put. *Nor can a promise be implied that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an express promise, such an implication would be utterly unreasonable.* * *" (Italics ours).

If it be held that Petitioner is entitled to recover from Carbide in this case, its negligence, which gives rise to such right of recovery, precludes the implication of any contract on the part of Amherst to indemnify Carbide for

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For other illustrations of this principle, see: *Washington Gaslight Co.* vs. *District of Columbia*, 161 U. S. 316; *Rich* vs. *U. S.*, (CCA 2) 177 F. 2d 688; *Standard Oil* vs. *Robbins Dry Dock Co.*, (CCA 2) 32 F. 2d 182; and *Gray* vs. *Boston Gaslight Co.*, (Mass.) 19 Am. Rep. 324.

its liability. We submit that the decisions hereinbefore referred to, show that a contract of indemnity will be implied only where the owner of a vessel is made liable solely because of a hazard *created* by the contractor, without any actual fault of his own. This is not, and, under the West Virginia Wrongful Death Act, can not be, such a case.

VII.

Conclusion

For the foregoing reasons it is submitted that the judgment of the Court of Appeals should be affirmed; and that, in any event, Carbide is not entitled to recover indemnity from Amherst.

Respectfully submitted,
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